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IN THE

Supreme Court of the United States

October Term 1957

No. 17

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

—against—

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT LOEW'S INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term 1957

No. 645

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

—against—

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

BRIEF OF RESPONDENT LOEW'S INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a motion picture antitrust suit. The petitioners, plaintiffs below, are four affiliated corporations which were engaged in the business of producing and distributing motion picture films in the period 1946-1950 (App. 4a, 5a-6a*). At no time were they in the business of exhibiting such films. *Ibid.* In their complaint petitioners sought to

* References to "App." are to the pages of the appendix to this brief, which consists of the opinion and decision of the trial court.

recover treble damages from the above named respondents, which are operators respectively of the Loew's and of the RKO theatres in New York City, for an alleged conspiracy on their part and on the part of the major producer-distributors of motion pictures (App. 4a-5a; R. 11-13). It was stipulated that the only claim for damages was in the period from September 1, 1946 to September 1, 1950 (App. 5a).

The alleged conspiracy, according to the complaint, was to restrain competition in the distribution of motion pictures to subsequent run or "neighborhood" theatres in the New York metropolitan area (R. 11-13). Neighborhood theatres are theatres showing films subsequent to the first runs of films on Broadway (App. 7a). In essence, it was petitioners' claim that the pictures of their competitors, the major producer-distributors (defendants in *U. S.* v. *Paramount, et al.**), had received more favorable treatment in the Loew's and RKO theatres in New York City than did petitioners. As a result, petitioners claimed, these producer-distributors received the substantial returns from the New York subsequent run theatres which would have been petitioners' but for the alleged conspiracy.

The producer-distributors, which were alleged to have conspired with Loew's and RKO, were Paramount Film Distributing Corporation, Warner Bros. Picture Distributing Corporation, Twentieth Century-Fox Film Corporation, Big U Film Exchange, Inc., United Artists Corporation, Radio Keith-Orpheum Corporation and RKO Radio

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* 66 F. Supp. 323 (S. D. N. Y. 1946); 70 F. Supp. 53 (S. D. N. Y. 1946), *aff'd in part, rev'd in part*, 334 U. S. 131 (1948); *opinion on remand*, 85 F. Supp. 881 (S. D. N. Y. 1949), *aff'd*, 339 U. S. 974 (1950).

Pictures Inc., all of which were engaged solely in distribution or production of pictures (R. 6-9; App. 5a).

Petitioners, however, did *not* seek money damages from these alleged co-conspirators, who, if there were such a conspiracy, were its prime beneficiaries. Damages were sought only against the exhibitor-defendants, Loew's and RKO, who operated theatres in New York. In the action as originally brought petitioners sought injunctive relief, but no more, against the producer-distributors (App. 2a). Because petitioners had ceased their distribution activities in 1950, when the case originally came on for trial before Hon. A. N. Hand sitting as District Judge, the producer-distributor defendants moved to dismiss the complaint as to them on the ground that the claim for injunctive relief was moot. Judge Hand granted this motion. See 121 F. Supp. 128 (S. D. N. Y. 1954). At the same time motions were made by all defendants to dismiss on the ground of a general release, which motion was also granted by Judge Hand. *Ibid.* On appeal, the Court of Appeals reversed the judgment to the extent the complaint was dismissed on the ground of the general release, and directed that the case proceed to trial. Thus, the only remaining defendants in the case were Loew's and RKO, the respondents here. See 219 F. 2d 196 (2d Cir. 1955).

The issues to be tried as framed at pre-trial were as follows:

> "1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in

the New York metropolitan area on runs subsequent to first run Broadway?

2. If so, were the plaintiffs directly damaged in their business or property as the result of the said illegal combination and conspiracy, and, if so, in what amount?"

The case was tried without jury before Hon. Archie O. Dawson in the United States District Court for the Southern District of New York. In a comprehensive opinion after trial, Judge Dawson held that the complaint should be dismissed on two separate but equally decisive grounds: (1) that petitioners had failed to prove any conspiracy on the part of respondents to exclude petitioners from the opportunity of licensing their feature motion pictures on a competitive basis to the Loew's and RKO theatres on subsequent run in New York City, and (2) that even assuming the existence of such a conspiracy, petitioners "failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis" (App. 29a).

It is significant that petitioners in their brief to this Court do not allude to this latter ground for dismissal of their complaint. For in holding that petitioners had failed to prove any causal relation between the alleged conspiracy, even if assumed to exist, and the claimed losses suffered, Judge Dawson made certain specific findings of fact as to the poor quality of petitioners' films and the fair treatment accorded them in respondents' theatres which are not only supported by the evidence, but were affirmed by a

majority on appeal. Thus, as we will discuss hereinafter in greater detail, this case was wholly determined by factual issues found in respondents' favor by two courts, and therefore no adequate reason exists for this Court to grant certiorari.

The appeal from the judgment entered on Judge Dawson's decision was argued in the Court of Appeals for the Second Circuit on November 15, 1956. The bench consisted of Chief Judge Clark and Judges Frank and Hincks. Before a decision was rendered Judge Frank died (Pets. App. 1*). Thereafter, on February 16, 1957 Judge Clark wrote to all counsel that "the court has asked Judge Waterman to take the papers in place of the late Judge Frank, and he will therefore serve as the third member of the panel." The letter also stated that as then advised "the court does not feel the need of further argument".

On September 9, 1957 the Court of Appeals rendered its decision of affirmance, Judge Waterman writing the opinion of the Court, concurred in by Judge Hincks, and Judge Clark dissenting. In his opinion, Judge Waterman considered all of petitioners' contentions, as well as the decree and findings and conclusions in the *Paramount* case, and concluded that the judgment should be affirmed on the grounds that there was no error of law shown to have been committed in the proceedings below and that the trial court's findings of fact withstood examination on appeal. Rule of Civil Procedure 52(a).

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* References to "Pets. App." are to the pages of the appendix to petitioners' brief, which consists of the opinions of the Court of Appeals below.

Questions

The questions presented by petitioners in their brief (p. 3) do not accurately reflect the proceedings below or raise the issues, decisive of the case, which demonstrate that no valid reason is presented for this Court's review on certiorari. In their first question presented, the petitioners ask "Whether the lower court misconstrued Section 5 [of the Clayton Act] and misapplied this Court's decision in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951) by failing to make available to petitioners 'all matters previously established by the Government in antitrust actions.' "

This begs the real question presented in this case. For it is clear, as we will demonstrate in our Argument below, that both the District Court and the Court of Appeals did make available to petitioners "all matters previously established by the Government in antitrust actions". The decree and the findings and conclusions in the *Paramount* case were admitted in evidence (Plaintiffs' Exs. 1 and 2; R. 585-644, 48, 57) and were examined in full (Pets. App. 8). All agree that this evidence would constitute *prima facie* proof on the conspiracy aspect of the case, *if* the conspiracy here charged was in fact "previously established by the Government" in the *Paramount* case. The point is that both lower courts held that the alleged conspiracy was *not* previously established.

Thus, the real question presented is simply whether the conspiracy alleged in petitioners' complaint was established in the *Paramount* case.

In their second question presented the petitioners seek to invoke this Court's supervisory jurisdiction because it

is asserted that the holding below reflects " a developing trend in some of our trial courts of hostility" toward anti-trust cases. There is not the barest shred of support in all of the proceedings below for this claim of "hostility", unless it be the merits of the decision itself that the complaint should be dismissed on the ground that petitioners failed to prove both the conspiracy alleged and the impact of such conspiracy upon their business. Thus, the questions more properly presented are whether the District Court's findings of fact are open to attack here and whether that Court's consideration of what was and was not decided in the *Paramount* case constituted error of law.

Reasons for Denial of the Writ

Summary of Argument

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19. The Rule embodies the criteria by which the Court determines whether a particular case merits consideration, with due regard to proper functioning of the limited reviewing powers to which this Court is confined. *Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U. S. 70, 73-4 (1955).

The only criteria of Rule 19 of possible applicability at bar are set forth in subdivision 1(b) of the Rule:

> (i)—where a court of apeals "has rendered a decision in conflict with the decision of another court of appeals on the same matter";

(ii)—where a court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court";

(iii)—where a court of appeals "has decided a federal question in a way in conflict with applicable decisions of this court";

(iv)—where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

(i) There is no conflict between the decision at bar and that of another court of appeals on the same matter, and petitioners do not point to any such conflict.

(ii) Nor do the decisions below constitute rulings on important questions of federal law which have not been, but should be, settled by this Court. The applicability of Section 5 of the Clayton Act has been considered by this Court not only in the *Emich* case but in others as well, involving the very prior Government civil action as that at bar—the *Paramount* case. *E. g., Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89 (1954); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954). Similarly, the rule applied below that a plaintiff in a treble damage suit under the Clayton Act must prove that the injury to property or business proximately resulted from the conspiracy, has likewise been considered by this Court and is the settled and universally applied rule in lower federal courts. *E.g., Partmar Corp.* v. *Paramount Pictures Theatres Corp., supra; Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629

(2d. Cir. 1952), *cert. denied*, 344 U. S. 875; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (4th Cir. 1934). The fact that this is the only private antitrust case that has been brought by a *distributor*, as distinguished from an *exhibitor*, of motion pictures does not create any novel questions of law undecided by this Court. Essential antitrust doctrine remains the same no matter who the plaintiff is, for the plaintiff, be he exhibitor or distributor, must prove conspiracy and damages proximately resulting from such conspiracy. Moreover, we know of no other private case pending or in the offing by a distributor, and thus, however important this case may be to petitioners, the questions decided are not "of such gravity and general importance as to require the review of the conclusions of the * * * Court of Appeals in reference to them". *In re Woods, Petitioner*, 143 U. S. 202, 206 (1892); *Fields* v. *United States*, 205 U. S. 292, 296 (1907). They are not "questions of importance which it is in the public interest to have decided by this Court of last resort". *Magnum Import Company, Inc.* v. *Coty*, 262 U. S. 159, 163 (1923).

(iii) Moreover, the decisions of Judge Dawson and of the majority of the Court of Appeals in no way "conflict" with applicable decisions of this Court. On the question of proof of conspiracy, the lower courts gave every benefit to the decree and findings and conclusions in the *Paramount* case to which such prior determinations are entitled under the statute and decisions of this Court. As stated above, the District Court held that the conspiracy alleged at bar was not determined or established in the *Paramount* case, and a majority of the Court of Appeals, upon an independent and full review of the prior Government case, came to

the same conclusion. Thus their denial of *prima facie* proof to such prior determination was not in conflict with Section 5 of the Clayton Act or with the *Emich* decision of this Court.

(iv) The record will be searched in vain for the slightest evidence that the lower courts departed from the accepted and usual course of judicial proceedings or that the Court of Appeals sanctioned any such departure. The assertion by Judge Clark in his dissent and by the petitioners in their brief to this Court that the decision below reflects "a developing trend in some of our trial courts of hostility" toward antitrust cases is unsupported in the record of objectivity, thoroughness and patience with which Judge Dawson considered all of petitioners' proof and contentions.

ARGUMENT

1. The judgment of dismissal is supported wholly on a decisive question of fact found by Judge Dawson and affirmed by the Court of Appeals, thus presenting no question for determination by this Court.

Assuming *arguendo* that petitioners are correct that *U. S.* v. *Paramount, et al.* adjudicated the existence of the conspiracy claimed here, the judgment must nevertheless stand on the lower courts' disposal of the equally decisive, but wholly independent, question of fact whether the poorer results achieved by the petitioners' films in the New York metropolitan area resulted directly and proximately from such conspiracy.

That the plaintiffs in a private antitrust suit must prove, in addition to the existence of a conspiracy, business losses

suffered as a proximate cause of such conspiracy, is settled law universally applied under the Clayton Act.

One of the most effective statements of the rule was made in *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.*, 197 F. 2d 629 (2d Cir. 1952; Clark, *J.*), *cert. denied*, 334 U. S. 875. In that case plaintiff proved that the defendants had been convicted of a criminal conspiracy to violate the antitrust laws; it did not, however, establish any causal connection between that conspiracy and its business failure. In affirming a dismissal of the complaint, the Court of Appeals stated:

> "The trial court dismissed the claim. Needless to say, this was justified unless plaintiff could show some connection between Monticello's failure and defendants' proven conspiracy; the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field.
>
> * * * * *
>
> Absent a showing of causal connection between the collusion and jobbers' refusals to handle plaintiff's product, dismissal was mandatory." 197 F. 2d at 631, 633.

In the case at bar, Judge Dawson after reviewing the evidence stated that the "Court finds as a fact * * * that plaintiffs have failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants * * *" (App. 29a).

This finding of fact and other supporting findings, unless "clearly erroneous", must stand. Rule of Civil Procedure

52(a). The Court of Appeals reviewed these findings and affirmed, stating that "we do not believe that the trial court's findings of fact were 'clearly erroneous'. Fed. R. Civ. P. 52(a)".

Under these circumstances this Court should not take the appeal. As has been held many times, this Court will not be moved to interpose its process of certiorari to review findings of fact unless clearly erroneous. *United States* v. *du Pont & Co.*, 351 U. S. 377, 381 (1956); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 393-5 (1948). Nor will this Court try the facts of cases *de novo*. *United States* v. *du Pont & Co., supra; Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597 (1951).

As was stated in *Graver Tank & Manufacturing Co., Inc., et al.* v. *Linde Air Products Co.*, 339 U. S. 605, 609-10 (1950):

> "Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous."

Especially is this so where the findings have been approved by the Court of Appeals. *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U. S. 3 (1936). In *Baumgartner* v. *United States*, 322 U. S. 665 (1944), this Court reversed a "finding of fact" labeled as such on the ground that it was in reality an erroneous legal conclusion. However, the Court referred to appellate consideration of true findings of fact, as follows:

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgment

is a rule of wisdom in judicial administration." (322 U. S. at 670)

We briefly review the findings of Judge Dawson to demonstrate not only that they are supportable under Rule 52(a) as not being "clearly erroneous" but that the District Court had ample evidence to base its dismissal of the complaint even upon an assumption of conspiracy.

During the period 1946-1950 petitioners distributed 195 motion pictures (App. 8a). No claim was made by petitioners that these were excluded from the RKO and Loew's circuits in New York (R. 25; App. 13a). On the contrary, petitioners concede that the proportion of their films actually exhibited on those circuits was "substantial" (R. 342). In fact, of their 195 pictures, defendant Loew's exhibited 110 in its neighborhood theatres (Loew's Ex. D; R. 468) and defendant RKO exhibited 111 in its neighborhood theatres (RKO Ex. D; R. 439).

Moreover, petitioners conceded that they were making no claim based upon discrimination against any individual picture (R. 124; App. 14a) or against any classes of pictures (R. 305).

What petitioners purport to be complaining of is what happened to their entire product (R. 305), "the overall view of [petitioners'] business as compared to the overall view of [the other distributors'] business" (R. 370). By a process of elimination, therefore, and considering the nature of their evidence, petitioners claimed nothing more or less than that respondents combined and conspired, not to exclude petitioners' pictures completely, not to discriminate against individual films of the petitioners, not

to discriminate against classes of their films, but solely to prevent petitioners from faring as well on New York subsequent runs, as compared to their performance nationally, as did the eight major distributors.

To prove this, petitioners offered a number of statistical ratios. One such ratio was calculated for petitioners and another for the eight major distributors. In the case of the petitioners the ratio is based on receipts from 195 pictures and shows that they derived 6.4% of their national revenue from New York metropolitan subsequent-run theatres (App. 19a). In the case of the eight major distributors, petitioners selected 96 "median" pictures and found that the eight major distributors derived 8.9% of their national revenue from New York metropolitan subsequent run theatres (App. 19a-20a). Petitioners argued that the differential of 2.5% proved the impact of the conspiracy (App. 20a).

Upon a closer examination of these statistics, however, the courts below found that the difference in revenue reflected by these ratios was not attributed to any conspiracy against petitioners' pictures. It appeared that 177, or 90%, of petitioners' 195 pictures had national gross film rentals of less than $500,000 each (App. 11a, 23a).

It was found as a fact that each of these 177 films actually obtained a *larger percentage* of their national gross from New York metropolitan subsequent run theatres than did the 35 films of the eight majors in the same category (App. 11a-12a). This was pointed up by both lower courts when they compared groups of films having comparable national film rentals, rather than comparing two large groups, each with an entirely different makeup, as peti-

tioners had done. The lower courts found as a fact that for pictures with national rental of less than $500,000 petitioners' ratio came to 6.2% as against a ratio of 5.9% for the eight major distributors (App. 11a-12a, 22a).

Thus, the District Court concluded that

> "On pictures which had a national rental of $500,000 or less, it appears that Eagle Lion did as well as or even slightly better than the eight major distributors." (App. 22a)

Of petitioners' 195 films, 18 had national rentals of over $500,000 (App. 23a). The ratio for these 18 films of their returns from the metropolitan New York area, compared to what they grossed nationally, was 6.7% (App. 22a). In the case of the major distributors, 40 of the 96 representative pictures grossed more than $500,000 nationally, and the ratio for these pictures was 9.2% (App. 22a, 23a). Thus, the crucial question of fact was posed by Judge Dawson:

> "Was this difference due to a deprivation of an equal competitive opportunity for the plaintiffs?" (App. 23a)

After reviewing the evidence as to the treatment accorded these 18 higher grossing pictures in the RKO and Loew's circuits, Judge Dawson concluded in the negative. He found specifically that

> "All eighteen of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing." *Ibid.*

After stating this evidence, Judge Dawson concluded:

> "This is certainly not proof of exclusion or lack of a competitive opportunity. Nor was there any proof that these pictures were entitled to a better place on the circuit." (App. 23a)

On the quality of petitioners' films, the findings of Judge Dawson were equally decisive. After reviewing the evidence, he found that:

> "We are considering two different classes of merchandise—one of a moderate grade [petitioners] and the other of a much higher grade [the major distributors, the alleged co-conspirators] * * *." (App. 24a)

> "* * * practically all of the films distributed by the plaintiffs were inferior in quality and drawing power to those distributed by the major distributors, * * *." (App. 26a)*

The trial court's findings as to the inferior quality of petitioners' pictures are supported by substantial evidence and have been affirmed by the Court of Appeals. There is thus presented no question which in any way would warrant this Court's review of the record. For, even if petitioners could persuade this Court that the decree and findings in *U. S.* v. *Paramount, et al.* established the existence of the conspiracy claimed at bar, they would still face the unassailable findings of fact that their over-all lower returns in New York City were the natural result of the

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* Supporting testimony on the poor quality of petitioners' product was given by one witness who had been in charge of their advertising, publicity and exploitation during part of the damage period (App. 14a), by the president and managing director of the Radio City Music Hall, an independent theatre (App. 26a), and by the fact that of their 195 films, petitioners' distributed 40 westerns, 43 foreign films and 26 re-issues (App. 11a).

inferior quality of their pictures rather than the direct result of that conspiracy.

2. The determination of the lower courts, that on the law and facts petitioners failed to prove the conspiracy alleged, does not raise any question worthy of this Court's review.

Petitioners' brief is devoted to an attack on the decisions below on the ground that Section 5 of the Clayton Act and the *Emich* decision of this Court were misapplied .

A prior judgment or decree in an antitrust action is admissible only to the extent allowed by Section 5 of the Clayton Act. *Buckeye Powder Co.* v. *du Pont Powder Co.*, 248 U. S. 55, 63 (1918). Section 5 provides that the final judgment or decree shall be *prima facie* evidence "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto".

This court held in *Emich* that "The evidentiary use which may be made under § 5 of the prior [judgment] * * * is thus to be determined by reference to the general doctrine of estoppel". 340 U. S. at 568. The court went on to hold that before estoppel can be applied to any matter in the second suit, it must be clear that the matter was "distinctly put in issue and directly determined" in the Government action. 340 U. S. at 569. This test was reiterated in *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 102 (1954):

> "* * * final judgment or decrees in Government antitrust actions are admissible under § 5 of the Clayton

> Act as *prima facie* evidence only on issues actually determined in the prior adjudication."

The decisions of Judge Waterman and Judge Dawson show clearly that the rule of law applied in the case at bar fully accords with the statute and the decisions of this Court. That the rule was correctly stated in the District Court is illustrated by the following quotation from Judge Dawson's decision:

> "Plaintiffs rely on § 5 of the Clayton Act, 15 U. S. C. § 16, which makes final judgments in government anti-trust suits 'prima facie evidence' in private suits. The effect of § 5 is to give the private litigant the benefit of the doctrine of estoppel by judgment as if it had been a party plaintiff to the government suit. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951). For this reason the Court accepted in evidence the decree in the *Paramount* case and the findings of fact and conclusions of law in that case." (App. 15a)

Petitioners state in their brief to this Court that the lower courts erred in "focusing exclusively on those [*Paramount* findings and conclusions] addressed to the local conspiracy in the New York neighborhood run market", and in failing to base their conclusions upon the entire record of the antecedent case. The courts below are accused of having isolated 2 out of 177 findings of fact and conclusions of law (brief pp. 18, 19, 21). From this premise petitioners conclude that the lower courts gave only "lip service" to *Emich*, but failed to apply the rule correctly because the entire record of the antecedent case was not examined.

Emich concerned the applicability under Section 5 of a prior criminal judgment entered on a general verdict of

guilty. This Court decided that the plaintiff in a later treble damage action was entitled to the benefit of all matters of fact and law necessarily decided under the verdict, but that, under such a verdict, all acts charged may not necessarily have been proven. It was thus the proper function of the trial judge in the treble damage action to use sound discretion in determining, from an examination of such documents as the record, the instructions to the jury, and the opinion of the court rendering the judgment, the precise determination reached in the criminal case. In directing this examination the Court stressed that the trial judge was bound by no mechanical rule but was to be clothed with broad discretion in defining these issues and limiting the effect of the judgment to matters actually decided.

It would seem clear that the procedure enunciated in *Emich* can more readily be applied to equity decrees, where the trial judge, in determining the matters adjudicated in the prior action, is able to examine the specific findings of fact and conclusions of law entered by the trial judge in the Government case. The availability of these findings and conclusions enable the court in the treble damage action to determine with a far greater degree of precision the matters previously adjudicated. These determinations can then be used by him in instructing the jury or in rendering a decision in cases tried without a jury. In either event the *Emich* principle of determining, from the record and other documents in the previous case, exactly what was decided, can be employed with equal or greater facility and precision than is available in the case of a criminal judgment.

Indeed, this Court, in the *Partmar* and *Theatre Enterprise* cases, *supra,* has approved the application of *Emich* to treble damage cases involving the use of equity decrees under Section 5. In so doing, this Court has approved the actions of the lower courts in making use, in the area of Civil decrees, of the sound reasoning of the *Emich* case.

This is precisely what was done in the case at bar. Petitioners are simply wrong when they assert that the lower courts isolated but two findings and neglected to consider the entire record of the prior case.

Not only did Judge Dawson admit in evidence *all* of the findings and conclusions in the *Paramount* case (Plaintiffs' Ex. 2, printed in full along with the *Paramount* decree, Plaintiffs' Ex. 1, at R. 585-644), but Judge Waterman in his affirming opinion stated clearly that:

> "We have examined these findings and conclusions [those few specifically called to the Court's attention by the petitioners], as well as the many other findings and conclusions embodied in that decree. We conclude that their relevance to the issues here in suit is even less than that of Finding No. 154(d) and Conclusion No. 16, which are discussed in detail in our opinion *infra.*" (Emphasis added) (Pets. App. 8)

Judge Dawson, too, made clear that in admitting the decree in *Paramount* he was not limiting his consideration to part of the record only. During colloquy with counsel just prior to admitting the decree, findings and conclusion in evidence, Judge Dawson stated that under the *Emich* decision:

> "the Court may look at any of the papers on record or any other papers. That was a jury case, as I

> understand it, and the Supreme Court said that the judge could then charge the jury not merely on the basis of the decree but the decree in the light of all the record in the case.
>
> So this being a non-jury case, if the decree is admissible certainly I would have the right to look at any other papers in the case to guide myself as to what that decree meant the same as I would have to instruct the jury if there were a jury here." (R. 52)

Accordingly, even though petitioners may disagree with the conclusion reached by the District Court and by a majority of the Court of Appeals that the entire *Paramount* case, including its "many other findings and conclusions", did not establish petitioners' conspiracy, it is clear that neither of these courts narrowed or otherwise altered the law as established by this Court in the *Emich* case. Hence, this contention of petitioner affords no basis for issuing a writ in this case.

Petitioners urge further that this Court should grant certiorari because "Congress intended that the private suit should be an important instrument for enforcing the antitrust laws" (brief p. 14). They argue that Section 5 of the Clayton Act was designed to implement this policy by minimizing "the immensity of the burden" upon plaintiffs to prove a conspiracy (brief pp. 14-15).

We do not quarrel with this conclusion and there is nothing in the opinions below which in any way casts doubt on this policy. But to give *prima facie* effect to matters not distinctly determined in a prior action, as petitioners would have at bar, can lead to very serious abuses of the judicial process. As Judge A. N. Hand stated on the record in the

Paramount case itself, just prior to the entry of the decrees of February 8, 1950, such a use of the prior decree "is crude judicial stuff, from the point of view of a judge, very, very crude stuff" (*Paramount* record, S. D. N. Y., Equity No. 82-273, S.M. 921). And as succinctly stated by the Court of Appeals for the Second Circuit (per Judge Clark) in *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629, 631-2 (2d Cir. 1952), *cert. denied*, 344 U. S. 875:

> "whatever is crucial to the treble-damage suit case and is not *distinctly determined* in the previous government suit must be proven by direct evidence. *Dipson Theatres* v. *Buffalo Theatres*, 2 Cir. 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363. Section 5 does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C.J., dissenting in *Milgram* v. *Loew's, Inc.*, 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407." (Emphasis added)

The courts below did no more or less than determine that the issue as framed for trial was not determined in the *Paramount* case. A careful review of the record in that case shows that there was no issue, finding, conclusion or other determination or adjudication that any of the defendants therein combined or conspired to exclude any *distributor*, including plaintiffs, from the opportunity of licensing their feature pictures to the Loew's or RKO New York neighborhood theatres or to any other theatres. The gist of the *Paramount* case was that independent *exhibitors* were deprived of the runs and clearances to which they

considered themselves entitled, and the decision in that case was concerned with exclusion of independent *exhibitors, i.e.,* independent theatre operators, not with the alleged exclusion of *distributors.*

This emphasis in the *Paramount* case on exclusion of *exhibitors* was pointed up by this Court in its *Paramount* opinion at pages 166-67 of 334 U. S.:

> "The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. *The central problem presented by these cases is which exhibitors get the highly profitable first-run business.*"*

See also 334 U. S. at 172-73.

Thus, full examination of the *Paramount* record by the lower courts, in light of the specific issues framed for trial in the case at bar, led to the conclusion, as stated by Judge Dawson, that

> "The Paramount case did not involve the issue as to whether plaintiffs were prevented from licensing their pictures on an equal competitive basis to the defendants. Since this issue was not in that case,

* Emphasis is the Court's, except in the last sentence.

> the decree in that case does not constitute prima facie evidence of any such ultimate fact." (App. 18a)

Petitioners' primary reliance was and is on *Paramount* Finding 154(d) and Conclusion 16. Finding 154(d) deals with "the first neighborhood run in New York City" and is the only finding purporting to deal with that local area (R. 636-37; App. 16a-17a). It states that the Loew's and RKO theatres divided "the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures" (R. 636-7). That there may have been no competition between the Loew's and RKO neighborhood theatres in obtaining the pictures of the *defendant* distributors does not mean that Loew's and RKO neighborhood theatres did not license the product of independent distributors or that there was no competition between Loew's and RKO for the independent product. This finding does not establish that there was any exclusion of an independent distributor from the Loew's or RKO theatres. The mere fact that RKO may not have sought to obtain films of some of the major distributors regularly licensed to Loew's and that Loew's may not have sought to obtain films of the other major distributors regularly licensed to RKO does not in any sense determine that an independent distributor with pictures to offer was excluded from the competitive opportunity to license them to either Loew's or RKO.

Similarly, Conclusion 16, in saying that Loew's and RKO monopolized the first neighborhood run in New York City and divided that market between themselves (R. 644), actually is a conclusion directly opposite to any theory

that an independent distributor was excluded. The thrust of this Conclusion is that Loew's and RKO theatres monopolized the first neighborhood exhibition of all the available product to the exclusion of other "would-be" first neighborhood run *exhibitors*. The essential ingredient of any such activity by theatres would be the engrossment of all available product, thus creating a demand for, rather than an exclusion of, what a distributor had to offer. This demonstrates once again that the *Paramount* case dealing with the problem of the exclusion of exhibitors did not adjudicate anything as to alleged exclusion of distributors, the issue tendered in the case at bar.

Judge Dawson recognized this when he stated:

> "While the findings may perhaps constitute evidence (on which point the Court finds it unnecessary to pass) that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case." (App. 17a).

This determination is simply a recognition of the fact that the evidentiary use of Section 5 is, by its own terms, limited by the doctrine of estoppel so that only those matters actually litigated and decided may be treated as *prima facie* evidence. Because of this statutory limitation, inferences are simply not entitled to such treatment. Therefore, the fact that there may have been no competition between RKO and Loew's for the product of the major

distributors in the *Paramount* case cannot be used under Section 5 and accepted principles of estoppel to sustain the inference that no competition existed among these defendants for the products of *independent* distributors, such as Eagle Lion.

Petitioners' direct evidence, such as it was, on the issue of conspiracy fell far short of establishing the conspiracy charged in the 1946-1950 period. As reviewed by Judge Waterman, the only testimony of an officer of the petitioners was that of Mr. MacMillan, the president of Chesapeake Industries, Inc., who testified that in a conversation with the president of RKO he complained that petitioners were not getting competitive access to the RKO circuit. Judge Waterman had this to say of petitioners' proof:

> "The trial judge properly gave little weight to this self-serving declaration, particularly since MacMillan admitted that he 'personally had nothing to do with the sale or distribution of pictures to the exhibitors.' The other witnesses called by the plaintiffs contributed no independent competent testimony tending to establish the existence of the alleged conspiracy." (Pets. App. 17-8)

Judge Dawson commented on petitioners' failure of proof as follows:

> "Plaintiffs offered no direct proof that there was in fact, any combination or conspiracy by the defendants to deprive the plaintiffs of an equal competitive opportunity to license their films.
>
> • • • • •
>
> Plaintiffs offered no testimony of any of their sales executives with reference to efforts made to secure licensing of pictures distributed by them during the period covered in the complaint from which

any inference could be drawn that they were discriminated against. * * *

If plaintiffs had been discriminated against in the competitive licensing of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced." (App. 13a, 14a)

After reviewing respondents' evidence that no agreement existed to exclude petitioners' pictures or deny them competitive access; that Loew's and RKO "screened" (that is examined with an eye for possible exhibition) all petitioners' films offered to them; that Loew's and RKO each exhibited over 100 of petitioners' pictures; and that *all* 18 which grossed nationally more than $500,000 were exhibited by Loew's or RKO on their full circuits, 17 of them being shown on the long (and more profitable) half of the week, Judge Dawson held:

"the evidence in this case clearly indicates that during the period involved in the action, there was no arbitrary allocation as between the circuits of the pictures of the plaintiffs or that the defendants excluded the pictures of the plaintiffs. * * * The evidence shows clearly that the plaintiffs were not excluded from this market." (App. 17a-18a)

It should be noted that as in the case of the other factual issues involved in this proceeding, the findings of fact on the issue of conspiracy must stand unless "clearly erroneous". Rule 52(a); cases cited *supra*, p. 12. As stated by

this court in *United States* v. *National Association of Real Estate Boards, et al.*, 339 U. S. 485, 495-96 (1950).

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *United States* v. *Gypsum Co.*, 333 U. S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

3. No grounds are presented which would warrant this Court to exercise its power of supervision over the courts below.

In their second question presented to this Court, petitioners call for the exercise of this Court's supervisory jurisdiction because of the assertion by Judge Clark in his dissent that Judge Dawson's decision reflects "a developing trend in some of our trial courts of hostility" toward antitrust cases. Judge Clark in his dissent also stated that:

> "although some of the deductions [from the statistical comparisons] doubtless contained fallacies of the kind the judge criticized, yet a more sympathetic approach might have contributed some constructive suggestions and deductions for the assaying of this evidence." (Pets. App. 22)

With all due deference, we respectfully submit that the record before the District Court utterly refutes any thought that Judge Dawson was hostile or unsympathetic in the trial of this case or in his consideration of the evidence and briefs. Throughout he exhibited patience and thoughtfulness on both sides of the case. Indeed, Judge Dawson

made suggestions to petitioners' trial counsel as to additional evidence which he thought would be helpful in understanding the issues. For example, near the close of petitioners' case in chief he made several specific suggestions to petitioners' counsel for their consideration "over night" so that they would have an opportunity of offering additional proof before their case was rested. The record goes on for pages (R. 343-350) of colloquy between counsel and the Court in which the Court fairly pointed out those areas of petitioners' case which could use further amplification and explanation.

Moreover, Judge Dawson admitted into evidence everything offered by the petitioners. In his words, when speaking to petitioners' counsel:

> "I am not going to prevent you from putting in any proof that you may think is relevant, because I am trying it without a jury. I will allow in any proof that you think is relevant, * * *." (R. 272)

That Judge Dawson treated petitioners fairly during the course of trial was attested to by petitioners' own trial counsel, who at the very end of the case had this to say:

> "MR. MCGOVERN: Your Honor, I am sure I reflect the opinion of all of us when I say we appreciate the courtesy and patience you have shown." (R. 554)

Furthermore Judge Dawson in his comprehensive opinion took up each of petitioners' contentions, reviewed all the evidence in the record and analyzed the complicated statistical formulae advanced by the parties. His decision and that of Judges Waterman and Hincks, while for the respondents, hardly reflect a growing "hostility" towards

these cases. Far from being unsympathetic, the courts below were, we prefer to think, entirely objective.

CONCLUSION

The foregoing review of the record and decisions below demonstrate that this case presents no more complicated, important or novel questions than were presented in numerous other private antitrust suits in which this Court quite properly declined to grant certiorari. *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 215 F. 2d 167 (9th Cir. 1954), *cert. denied*, 348 U. S. 912 (1955); *Harrison* v. *Paramount Pictures, Inc.*, 211 F. 2d 405 (3d Cir. 1954), *cert. denied*, 348 U. S. 828 (1954); *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587 (2d Cir. 1949), *cert. denied*, 338 U. S. 894 (1949), *rehearing denied*, 338 U. S. 940 (1949); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629 (2d Cir. 1952), *cert. denied*, 344 U. S. 875 (1952); *The Flintkote Company* v. *Lysfjord, et al.*, 246 F. 2d 368 (9th Cir. 1957), *cert. denied*, (2 L. Ed. 2d No. 1, p. 46; October 14, 1957).

The petition should be denied.

Dated: New York, N. Y.
January 4, 1958.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Plaintiffs,

—against—

LOEW'S INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP.,

Defendants.

Appearances:

JAMES L. O'CONNOR, of New York, N. Y.
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EDWARD C. RAFTERY
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WILLIAM F. WHITMAN,
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Appendix A

DAWSON, *D.J.*:

This is an action tried by the Court without a jury wherein the plaintiffs seek treble damages under the anti-trust laws, 15 U. S. C. 1, 2, 15, against Loew's, Inc. (hereinafter called "Loew's") and RKO Theatres, Inc. and RKO Film Booking Corp. (hereinafter called "RKO").

PROCEEDINGS PRIOR TO TRIAL

The complaint was filed on October 3, 1950. It named as defendants all of the distributor defendants named in *United States* v. *Paramount Pictures, Inc.** (hereinafter called the "Paramount case"). As to the distributor defendants, it sought injunctive relief. As to the present defendants, it sought injunctive relief and treble damages in the amount of $15,000,000 plus attorneys' fees.

In the original complaint, Eagle Lion Classics, Inc. was named as one of the parties plaintiff. In 1951, this corporation was sold to United Artists Corp., one of the distributor defendants. Following a settlement of disputes which arose over the contract of purchase, Chesapeake Industries, Inc., the parent corporation among the plaintiffs, gave United Artists a release on December 31, 1953. Thereafter, on the defendants' motion, Judge A. N. Hand dismissed the complaint, 121 F. Supp. 128, on the grounds that the sale of Eagle Lion Classics, Inc., the only party plaintiff threatened by the conspiracy, made the claim for injunctive relief moot, and that the claim for damages against the exhibitor defendants had been released by the release of one joint tortfeasor without reserving rights against the others. The

* 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1946), reversed and remanded in part, 334 U. S. 131 (1948); 85 F. Supp. 881 (1949), aff'd 339 U. S. 974 (1950).

plaintiffs appealed the dismissal of the complaint, insofar as it related to the damage claims. The Court of Appeals reversed on the ground that none of the claims for damages was the subject of the release, 219 F. 2d 196 (Feb. 1, 1955). This action, therefore, involves only the claim for damages against the two remaining defendants, Loew's and RKO.

The Issues

The complaint is based exclusively on alleged violations of the anti-trust laws. The issues were framed in a pre-trial order entered by Judge Ryan of this Court on November 2, 1953. Such issues must, in the absence of modification, control the subsequent course of the action (Calendar Rule 18, S. D. N. Y.). The issues as set forth in the pre-trial order are as follows:

"1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?

"2. If so, were the plaintiffs directly damaged in their business or property as the result of the said illegal combination and conspiracy and, if so, in what amount?"

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The Facts

1. *The parties*

There are four affiliated parties plaintiff (referred to herein as "the plaintiffs") to the present suit:

Eagle Lion Studios, Inc.—a California corporation engaged in the business of producing motion pictures up to 1949;

Eagle Lion Films, Inc.—an Ohio corporation engaged in the business of distributing the films produced both by its affiliate (above) and by other producers from 1945 until June, 1950;

PRC Productions, Inc.—a Delaware corporation organized in 1943 and engaged in the business of producing motion pictures until 1946 when all of its assets were transferred to Eagle Lion Studios, Inc., above; and

Chesapeake Industries, Inc. (formerly Pathe Industries, Inc.)—an Ohio corporation which owns all of the stock of the other three parties plaintiff.

There are at present three defendants:

Loew's Inc.—a Delaware corporation, now engaged in the business of producing and distributing motion pictures and formerly, at the times material to this action, engaged in the exhibition of motion pictures in theatres owned or controlled by it either directly or through subsidiaries;

RKO Theatres, Inc.— a New York corporation engaged in the business of exhibiting motion pictures in theatres owned or controlled by it; and

RKO Film Booking Corp.—a New York corporation engaged in the business of booking films for exhibition.

Appendix A

Originally there were six other defendants, all nation-wide film distributors, but the action was dismissed as to them.

The defendants are corporations which operate those motion picture theatres in metropolitan New York which are known, respectively, as the Loew's and RKO circuits.

2. *Area involved in the action*

The New York metropolitan area, which under the pre-trial order is the area involved in this action, is defined in the complaint as "the five boroughs of greater New York City, southern portion of Westchester County and western portion of Nassau County, New York State". No part of the State of New Jersey is included in the New York metropolitan area, as defined in the complaint and in the interrogatories submitted by the plaintiff.

3. *Period of time involved in the action*

The complaint alleged that the conspiracy which caused it damage began prior to 1944, but it was stipulated that the only claim for damages was in the period from September 1, 1946 to September 1, 1950. The action was instituted on October 3, 1950.

4. *The activities of the plaintiffs prior to September 1, 1946*

In 1943, PRC Productions, Inc. was created to produce low budget pictures, and PRC Pictures, Inc. was created to distribute those low budget pictures. In 1946, PRC Pictures, Inc. was dissolved, and its distribution activities were assumed by Eagle Lion Films, Inc. and its assets were transferred to Eagle Lion Studios, Inc. In that year, the parent company, Chesapeake Industries, Inc. (then known as Pathe Industries, Inc.) decided to make and dis-

tribute higher budget pictures, and determined that its subsidiary, Eagle Lion Studios, Inc. would produce them and Eagle Lion Films, Inc. would distribute them. This was in part because of the fact that in 1945, an informal agreement was reached with the J. Arthur Rank organization of England which provided, in effect, that Chesapeake Industries, Inc. would produce a minimum of five pictures a year for distribution by the J. Arthur Rank organization in England and other areas, and that the English company would produce five pictures to be distributed by Chesapeake Industries, Inc. or its affiliates. This agreement was reached informally in 1945.

In September, 1946, Chesapeake created Eagle Lion Films, Inc. to distribute the pictures in accordance with this contract, and in November, 1946, created Eagle Lion Studios, Inc. to produce the pictures. The agreement with the J. Arthur Rank organization was not formally signed until April 18, 1947. Eagle Lion Studios, Inc. was put into funds to take over the production facilities of a studio in Hollywood, California, and a million and a half dollars was invested to put it in condition to make these pictures. Eagle Lion Studios, Inc. continued to make some low budget pictures and some westerns, but also embarked upon a program of making some more expensive pictures.

During all of the years from 1946 through 1951, plaintiffs' motion pictures activities resulted in a loss. This loss, however, was not merely in the distribution of pictures. The figures introduced in evidence showed that in this five-year period, the average annual loss of the plaintiffs was $2,271,573 in its production activities, and $495,425 in its distribution activities. These figures represent plaintiffs' activities on a worldwide basis. This action is merely limited to the situation in the New York metropolitan area and in connection with the licensing of pictures on runs "subsequent" to first run theatres.

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5. *Subsequent run theatres*

"Subsequent run" means all theatres except the approximately 40 first run theatres principally concentrated in the Broadway midtown area and includes first subsequent run, second subsequent run, and so forth. The total number of subsequent run theatres in the area involved and in the period involved has been variously estimated at from 600 to 800. Subsequent run theatres are frequently called "neighborhood theatres".

Of these subsequent run theatres, there were during 1946-1950 operating on a first neighborhood run basis some 44 or 45 theatres belonging to Loew's, some 31 to 36 theatres belonging to RKO, and some 17 others. Loew's also operated 13 or 14 second neighborhood run theatres, and RKO operated from 1 to 3 second neighborhood run theatres. First run neighborhood theatres were theatres which ordinarily displayed the pictures following a run in the first run theatres. However, there were times when pictures would be shown in the first run neighborhood theatres even though they had not been shown in first run theatres. The plaintiffs have not complained of any discrimination against their pictures in the first run theatres, but base their complaint solely upon the failure to license their pictures for the first run neighborhood theatres of the RKO and Loew's chains.

In addition to the Loew's and RKO circuits, there were in 1948 seven other subsequent run circuits in the area comprised of between 29 and 78 theatres each and totaling altogether some 252 theatres.

In the event that a picture did not play on a first neighborhood run circuit, it became that much more difficult to play in subsequent run theatres. By the same token, if a picture did not play in a first run theatre in the Broadway area, it became that much more difficult to secure a com-

mitment for the showing of the picture on the first neighborhood run circuit.

In addition to the theatres above described, there was another group of theatres known as the "art" theatres which customarily played single films instead of double features, usually at a higher admission charge than a first run neighborhood theatre, and frequently played foreign films.

6. *Films distributed by the plaintiffs*

In the period in question, there were distributed by the plaintiffs 195 pictures; one picture "Red Shoes" was distributed twice so that in some of the evidence, the total is given as 196 pictures.

7. *Method of selling pictures*

The general procedure for selecting pictures to be exhibited either on the circuits or in individual theatres is for the company which is distributing them to make arrangements for the exhibition of the picture in a projection room maintained by the exhibitor. These exhibitions are known as "screenings". Thereafter, the exhibitor discusses the terms that it is willing to pay for the picture and how the picture is to be displayed, and negotiations take place for the price to be paid for the picture. The circuits in the New York metropolitan area customarily had changes of pictures twice a week. Some pictures were shown on the "long half" which meant that the picture played approximately five or six days a week, and some played on the "short half" which meant that the picture played one or two days of the week. Generally, two pictures were played together with one receiving "top billing". Sometimes the two were given equal or "split billing". Ordinarily the distributor received a percentage of the gross admissions

receipts only for the pictures playing the top of the long half, or a split billing of the long half. For the rest it received a flat rental and this was regarded as less favorable.

8. *Screenings of the pictures distributed by the plaintiffs*

The undisputed testimony was that of the 195 pictures distributed by the plaintiffs in this period, Loew's "screened" not less than 108 pictures and RKO "screened" at least 129 pictures. No contention has been made that the defendants refused to "screen" these pictures with a view toward seeing whether they would be purchased by them. Plaintiffs concede, for example, that defendants "screened" all of plaintiffs' pictures made available to it for that purpose.

9. *Eagle Lion Pictures exhibited by the defendants*

Of the 195 pictures distributed by the plaintiffs during the period in question, the defendants exhibited 85 pictures on one or the other of its circuits in the New York metropolitan area. The playing terms of the 85 were as follows:

No. played long half top or split billing	8
No. played long half second billing	24
No. played short half	53
Total	85

Each of the defendants exhibited certain other pictures distributed by the plaintiffs in one or more theatres amounting to less than the full circuit. Loew's played some 39 additional pictures in addition to the 50 which it played on the entire circuit. RKO exhibited in one or more of its theatres during the period in question some 55 additional pictures. The evidence shows that during the period in

question, Loew's licensed pictures from 38 distributors and RKO licensed pictures from over 30 distributors.

10. *Sale of plaintiffs' distribution business*

Plaintiffs, throughout their entire history, have been weak companies. During the years 1946 through 1951, the plaintiffs lost over $13,000,000 in the production of films and nearly $3,000,000 in the distribution of films. These losses were admittedly not the result of any competitive situation which might have existed in subsequent run theatres in the greater New York metropolitan area. Plaintiffs contend that their damages in that area would have been only $417,000.

As a matter of conceded fact, plaintiffs had enough pictures to operate at a profit only during the last six months of 1950 when Eagle Lion obtained a substantial number of additional pictures through merger negotiations with Film Classics. The additional revenue from these additional pictures "began to die out" early in 1951, as stated by the President of Chesapeake Industries, Inc., and the distribution business was sold to United Artists Corporation. The loss on this sale was computed by the accountant called as a witness by the plaintiffs as $146,440.

Although plaintiffs had been losing money throughout their entire history, the amount of total gross film rentals which they received was not insignificant. In the seasons 1946-1947 through 1949-1950, plaintiffs earned total gross film rentals on the 195 films which they distributed of $39,107,800 in the domestic market, of which $2,362,200 was received from neighborhood theatres in the greater New York metropolitan area.

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11. *Nature of the Eagle Lion pictures*

The 195 Eagle Lion pictures included about 40 "Westerns", 43 foreign films which were made abroad, and 26 re-issued films. A re-issued film is one which has been distributed through the Country and which is later released, at the discretion of the distributor, for further distribution and exhibition. A re-issued film was ordinarily not played on a first neighborhood run basis. Few of the foreign made Eagle Lion films were shown in the circuits of the defendants. These films were customarily shown in the so-called "art" theatres not affiliated with either circuit. However, all foreign made Eagle Lion films grossing less than $500,000 took 13.2% of their total domestic rental out of neighborhood theatres in the New York metropolitan area, which was substantially greater than the percentage of rental received from this area by all Eagle Lion films.

12. *Ratio of subsequent run rental from metropolitan New York to national film rental*

The ratio of subsequent run rental from metropolitan New York to national film rental, less such subsequent run rental, was as follows:

Eagle Lion

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
97	Under $100,000	6.9%
51	100,000 to 200,000	5.4%
10	200,000 to 300,000	6.7%
16	300,000 to 400,000	5.9%
3	400,000 to 500,000	8.6%
18	Over 500,000	6.7%
195		6.4%

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8 Distributors*

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
7	Under $100,000	5.2%
10	100,000 to 200,000	4.9%
7	200,000 to 300,000	6.6%
6	300,000 to 400,000	5.1%
5	400,000 to 500,000	7.1%
61	Over 500,000	9.2%
96		8.9%

* These were not all the films distributed by the 8 distributors in the four-year period, but were median pictures selected as representative of the entire distribution by the plaintiffs in preparing their statistical studies.

13. *Pictures available for exhibition*

The circuit of each defendant used only about 104 features per year as its long half attractions, being two features per week per circuit. The eight major distributors distributed, in the four year period, over 1,000 features, or more than 250 features per year. Eagle Lion distributed in that four-year period a total of 195 pictures.

Discussion

The primary issue in this case is, in the language of the pre-trial order,

> "Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit fea-

ture motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?"

No proof was offered that plaintiffs were entirely excluded from licensing their pictures to these theatres in that area. As has heretofore been shown, many of their pictures were in fact licensed for exhibition to the Loew's and RKO circuits in New York. The only question would be whether plaintiffs were excluded from the opportunity of licensing such pictures "on a competitive basis". This would involve the question as to whether, in the licensing of their pictures, plaintiffs were discriminated against so that they did not have an equal competitive opportunity.

Plaintiffs offered no direct proof that there was, in fact, any combination or conspiracy between the defendants to deprive the plaintiffs of an equal competitive opportunity to license their films. The presidents of both defendants denied explicitly that there was any agreement between the defendants relating to the licensing of pictures of the plaintiffs or that either of them knew about the negotiations which the other had with reference to licensing pictures from the plaintiffs. Plaintiffs offered no testimony of any of their sales executives with reference to efforts made to secure licensing of pictures distributed by them during the period covered in the complaint from which any inference could be drawn that they were discriminated against. The only testimony of an officer of the plaintiffs was the testimony of Mr. MacMillen, the president of Chesapeake Industries, Inc., who stated that he "personally had nothing to do with the sale or distribution of pictures to the exhibitors", but who testified that after the decree had been entered in *United States* v. *Paramount* in the first part of 1950, he went to the offices of the defendants and complained about discrimination, saying to the president of RKO "that unless we got competitive access to the circuit we would have no alternative but to bring a suit for

damages under the antitrust laws." Whether this was a threat to secure better terms in the future from the defendants or whether it was a justifiable complaint certainly does not appear from the testimony of Mr. MacMillen who admitted that he knew nothing about the sale and distribution of pictures.

If plaintiffs had been discriminated against in the competitive licensing of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced. In fact, plaintiffs admitted that they had no complaint as to their treatment on any particular picture.

The defendants, on the other hand, called as their witness Max Youngstein, who had been in charge of "advertising, publicity and exploitation" for plaintiff Eagle Lion Films for two years from 1946. His testimony did not indicate that the treatment of plaintiffs' pictures on the circuits of the defendants was due to any effort of the defendants to deprive plaintiffs of a competitive position. He stated that the poor returns on plaintiffs' pictures was due to the fact that the films of the plaintiffs were, from the standpoint of box office appeal, at "the very bottom rung of the ladder" and "much inferior" to films which were being offered by other distributors.

The plaintiffs did not establish that they were excluded from either of the circuits or that their pictures were allocated as between the circuits. Nor have they produced any evidence which would indicate that one of the defendants consulted with the other with reference to the exhibition of plaintiffs' pictures. Plaintiffs have had several years to prepare this case for trial and ample opportunity to in-

voke the discovery processes of the Court, and if any such evidence was available, it may be assumed that plaintiffs would have secured it.

Plaintiffs, in the absence of direct proof that there was a combination or conspiracy of the defendants which deprived them of the opportunity to license their pictures on a "competitive basis", relied upon two items of proof: (1) the decree and findings of fact and conclusions of law in the *Paramount* case, and (2) the fact that the ratio of plaintiffs' receipts for subsequent run metropolitan New York theatres as compared to their national receipts differed from the average ratio of the eight major distributors.

The first question, of course, is whether the decree and the findings of fact and conclusions of law in the *Paramount* case established as a fact that the defendants combined and conspired to exclude plaintiffs from the opportunity of licensing their pictures on a competitive basis in the Loew and RKO circuits during the period involved in the action. Plaintiffs rely on §5 of the Clayton Act, 15 U. S. C. §16, which makes final judgments in government anti-trust suits "prima facie evidence" in private suits. The effect of §5 is to give the private litigant the benefit of the doctrine of estoppel by judgment as if it had been a party plaintiff to the government suit. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951). For this reason the Court accepted in evidence the decree in the *Paramount* case and the findings of fact and conclusions of law in that case.

The defendants assert that the *Paramount* case had nothing to do with the subject of the present action. In large part, that is true because the primary issue in that case related to the effect under the anti-trust laws of a combination between the large producers of motion pictures who also controlled, to a substantial extent, the places of

exhibition of those motion pictures. Many of the findings of fact and conclusions have nothing to do with the issue in this case.

General findings of violation of the anti-trust laws in the *Paramount* case are insufficient to impose liability in the present case unless plaintiffs have introduced evidence to relate those findings to the issue in the present case. See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 133 F. Supp. 839, 845, 846 (S. D. N. Y. 1955); *Fifth and Walnut* v. *Loew's, Inc.*, 176 F. 2d 587, 593 (2d Cir. 1949); *20th C. Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 859 (8th Cir. 1952). The plaintiffs have not supplied the deficiency by directing attention to any parts of the record in the *Paramount* case that show that the issue involved in this case in this area was adjudicated, *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir. 1951).

Plaintiffs, however, specifically rely upon finding of fact No. 154(d)* which would seem to have some relationship,

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* "154(d). In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000."

at least so far as the first sentence of the finding is concerned, to the issue in the present case. This sentence reads as follows:

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition *between them* in obtaining pictures." (italics supplied)

Conclusion of law No. 16 in the *Paramount* case reads as follows:

> "Loew's, Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO."

While the findings may perhaps constitute evidence (on which point the Court finds it unnecessary to pass) that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called "independents" such as the plaintiffs in the present case.

Whatever may have been the situation as between Loew's and RKO with reference to the exhibition of their products and the products of other major distributors, the evidence in this case clearly indicates that during the period involved in the action, there was no arbitrary allocation as between the circuits of the pictures of the plaintiffs or that

the defendants excluded the pictures of the plaintiffs. It does not necessarily follow from the fact that there had been an allocation of the major distributors who were defendants in the *Paramount* case that the product of all other independent distributors of motion pictures was allocated or that there was no competition for the product of these independent distributors. Likewise, the plaintiffs have not complained that their product was "divided" or allocated in any particular way by and between the present defendants. The evidence shows clearly that the plaintiffs were not excluded from this market. Under these circumstances, the findings of fact and conclusions of law in the *Paramount* case are insufficient in and of themselves to establish exclusion by any combination and conspiracy. The *Paramount* case did not involve the issue as to whether plaintiffs were prevented from licensing their pictures on an equal competitive basis to the defendants. Since this issue was not in that case, the decree in that case does not constitute prima facie evidence of any such ultimate fact.

In the absence of proof of actual combination or conspiracy to deprive the plaintiffs of an equal competitive opportunity, plaintiffs would have the Court draw the conclusion that there was such combination or conspiracy by a comparison of the ratio of the income received by the plaintiffs from the subsequent run theatres in New York to the income received nationally as compared to the ratio of the income received by the eight major distributors from the subsequent run theatres in New York to the income which these distributors received nationally. In other words, the plaintiffs contend that the income which they received in the subsequent run theatres in New York, in comparison with the income received nationally and as contrasted with the similar figures for the eight major distributors, would lead to the conclusion that there had been a combination or conspiracy between the defendants

to exclude them from licensing their pictures in the subsequent run theatres in New York on an equal competitive basis. Plaintiffs base this upon the hypothesis that if they did not receive for their pictures as large a proportion of income from the New York subsequent run theatres compared to their national gross income, as did the major distributors, it would show that they had been discriminated against in New York. This argument presumes, of course, that they were not discriminated against on a national basis.

Plaintiffs rely upon certain statistical studies made by them. These are combined primarily in an exhibit (Ex. 10) which sets forth two ratios prepared in part from answers to interrogatories by the defendants, including those defendants against whom the action has been discontinued. Exhibit 10 is a chart which reads:

"Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental Less such Subsequent Run Rental" *

"For all Eagle-Lion Product for Seasons 1946-50 (195 Features)"	"For Representative Product of 8 Major Distributors for Seasons 1946-50 (96 Features)"
6.4%	8.9%

The 96 representative product pictures of the eight distributors (all defendants in *United States* v. *Paramount*) were picked as follows: all pictures for each distributor for each of the four motion picture years from September 1, 1946 through August 31, 1950 were put in 32 separate lists in order of national rental. Then three median rentals were selected from each list: (1) the median rental for the entire

* Subsequent run rental, as used in Exhibit 10, includes that from all theatres except the 40 odd first run. It is not limited to rental from the defendants' theatres.

list, (2) that from the top quarter of the pictures, and (3) that from the lowest quarter of the pictures.

The plaintiffs have used the difference in ratios between 6.4% and 8.9%, which is 2.5%, to calculate that by reason of discriminatory practices in the metropolitan New York area, they lost at least $417,000 in net rentals on the films distributed through the four motion picture years in question. They arrived at this sum by taking 2.5% of the difference between their total domestic gross film rentals and their New York metropolitan area neighborhood theatre gross film rentals. The resulting figure of $919,000 was reduced by subtracting a sum which represented the average share (54.6%) of the gross film rental that went to the producer. (Apparently no allowance has been made for any of the other expenses usually incident to the earning of the film rentals.)

The purpose of using ratios instead of dollar amounts to show the discriminatory effect was, as counsel for plaintiffs explained it, because the pictures of the eight major distributors "all grossed, on the average, substantially more per picture nationally than Eagle Lion did."

This chart may, on the surface, seem to be persuasive for the point contended for by the plaintiffs. However, like all statistical studies, it is necessary to see whether there has been any statistical fallacy inherent in the statistical method used. One of the most insidious of statistical fallacies is the drawing of averages from a body of statistical data which is not comparable in kind or quality.*

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* "In order for a comparison to yield a meaningful, logical and significant result, the two quantities compared must be of the same quality or kind and must be stated in identical or comparable units. In other words, the variables compared must differ in *quantity only* as measured in *identical units*." Blair, *Elementary Statistics* (Henry Holt and Company, 1944) p. 42.

Appendix A

There is no more insidiously persuasive, and at the same time unreliable, type of evidence than that produced by taking a group of non-comparable figures, averaging them, and then attempting to draw a conclusion from that average.* An analysis of the underlying data and of the problem sought to be solved must precede any statistical approach. Therefore, any good statistical analysis would seek to ascertain whether the averages, when found, would be constant throughout the run of the data, or whether the averages were the result of particular factors in the data. That is why a plotted curve is frequently a better expression of averages than a mere statement of an arithmetical average of a total of figures.** If the averages are not constant through the run of the data, it becomes important to ascertain what factors influenced the change in the averages.

An analysis of the data submitted in support of plaintiffs' Exhibit 10 shows that the conclusion of the plaintiffs that their pictures did poorer proportionately in the New York area, when compared to the national figures, than did the defendants' pictures, was a conclusion which was not true as to all pictures. A plotted curve would show that the ratio varied with the drawing power of the picture as evidenced by the national film rentals.

Thus, if we break down the ratios relied on by the plaintiffs into similar ratios which compare all Eagle Lion films which received national rental of $500,000 or less with the

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* Such as saying that if 51% of the population of the United States is male and 49% is female, an average American is 51% male and 49% female, i.e., an hermaphrodite.

** In the field of statistical analysis, this is called "Regression", which is a comparison between two or more variables. "It ferrets out and expresses in clear, measureable terms the hidden and inner meanings of great masses of numbers which otherwise would remain unknown." Blair, *op. cit.* p. 230.

IN THE

Supreme Court of the United States

October Term 1957

No. 645

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

—against—

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENTS, RKO THEATRES, INC., and RKO FILM BOOKING CORPORATION, In Opposition

Opinions Below

The opinion of the District Court is reported in 141 F. Sup. 658-673 and is attached hereto as Appendix A. The opinions of the Court of Appeals for the Second Circuit are reproduced at pages A. 1-A.23 of the Appendix to the Petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254.

Questions Presented

The only question presented in Petitioners' Petition is whether the Trial Court erred in its findings of fact and conclusions of law that there was not a conspiracy among the defendants to injure the plaintiffs in their property or business. These findings of fact and conclusions were affirmed by a divided Court.

Statutes Involved

The Statutes involved are the Act of July 2, 1890, 26 Stat. 209; and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

Statement

Petitioners seek this Writ, asserting in effect that the Court of Appeals has decided "a Federal question probably in conflict with applicable decisions of this Court." The petition is based on the theory that the majority of the Court of Appeals has misinterpreted and mis-applied the decision of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, and has misconstrued Section 5 of the Clayton Act and mis-applied this Court's decision in *Emich Motors Corporation* v. *General Motors*, 340 U. S. 558 by failing to make available to Petitioners all matters previ-

ously established by the government in anti-trust actions (R. 568). That theory is made possible only by Petitioners' complete distortion of the decision of the District Court and the majority opinion of the Court of Appeals. Petitioners then ask that this Court grant its petition on the theory that this case calls for the exercise of this Court's supervisory jurisdiction in that Judge Clark noted in his dissenting opinion (A. 23) a developing trend in some of our trial courts of hostility toward Antitrust cases.

Statement of the Case

The issues in this case:

1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the petitioners from the opportunity of licensing on a competitive basis their feature motion pictures to the Loew's and R. K. O. theatres exhibiting feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?
2. If so, were the petitioners directly damaged in their business or property as the result of said illegal combination and conspiracy, and if so, in what amount?

Petitioners' History

PRC Productions, Inc. had for many years prior to the commencement of this action been engaged in the business of producing second-rate motion pictures mostly of the action and western type which had been generally exhibited for the most part in inferior theatres. The negative costs were low, the national grosses were low. It terminated all

activity in that regard in 1946, when all its assets were transferred to Eagle Lion Studios.

Eagle Lion Films, Inc. was organized in the fall of 1945 and was engaged in the business of distributing motion pictures during the four seasons 1946-1947, 1947-1948, 1948-1949 and 1949-1950, down to June 10, 1950, when Eagle Lion Classics took over.

Eagle Lion Studios, Inc. was engaged in the business of producing motion pictures prior to the institution of this suit and continued to 1949.

At the time this suit was instituted, the Chesapeake Industries owned all the stock of the other corporations herein, and up to May 1, 1952 was known as "Pathe Industries, Inc.," its prior corporate name.

At the time of the commencement of the alleged damage period herein, Eagle Lion had for its source of supply for distribution the inferior PRC pictures, British pictures produced by J. Arthur Rank organizations, of which the better pictures were turned over to Universal for distribution (Exs. 3 & 4, R. 83, 84, 85).

To supplement this, Eagle Lion made some contracts for distribution of pictures produced by independent producers and also formed a production company called the "Eagle Lion Studios, Inc." and from these sources during the alleged damage period herein, 1946-1950, released for distribution in New York City 196 motion pictures.

Summary of Petitioners' Proof

Petitioners' proof was primarily statistical and utterly failed to establish a cause of action.

The first witness called on behalf of the petitioners was William C. MacMillan, Jr., President of Chesapeake Industries, Inc. The other petitioners in this action are wholly-owned subsidiaries of Chesapeake (R. 75). Mr. MacMillan became president of Chesapeake in 1948. Prior to that time he was an assistant secretary (R. 171). The witness was formerly a practicing attorney in Troy, New York, and at the termination of the war in 1945 joined the Robert Young organization (R. 169).

His primary function at that time was president of the Federation for Railway Progress, which was a magazine publication, and during 1946 and 1947 his primary job was in connection with this occupation (R. 170). In so far as the operation of Chesapeake is concerned, during the period 1946 up to 1948, when he became president, he had nothing to do with the operation of this corporation either in the acquisition of pictures or the distribution thereof, and his first active participation in the affairs of Chesapeake was in the summer of 1948, when he became president (R. 172).

He testified that William Heineman was vice-president in charge of sales of the company, and in conjunction with his sales staff determined the distribution policy for these Eagle Lion films (R. 90). He testified that when he became vice-president of these Eagle Lion companies in the summer of 1948, they were not operating at a profit, but had a substantial loss (R. 94). He testified that he was no judge

of the quality of the pictures (R. 177), and upon being asked the following questions, testified as follows:

> Q. Were any Eagle Lion films shown in the Loew's and RKO circuits in the years 1946 to 1950? A. Yes.
>
> Q. And a number of them or just— A. Yes (R. 145).
>
> Q. Now, you are not claiming in this lawsuit any discrimination by RKO against any one of your particular pictures; isn't that a fact? A. Yes. The gist of our complaint is not against any particular pictures; against the practice that existed.
>
> Q. And you so testified on your deposition, you are making no complaint against RKO or Loew's based upon discrimination against any individual picture released by you? A. That is correct (R. 190).

There was no testimony offered that Mr. MacMillan himself had ever done anything in respect to obtaining what he considered a better play-off of Eagle Lion pictures other than that in the spring of 1950 (and, as a matter of fact, he affirmatively testified that he never tried to sell RKO or Loew's pictures himself (R. 138)), he saw Mr. Kingsburg who was then president of RKO and stated to him that he did not think that Eagle Lion was getting competitive access to the RKO theatres, and that he intended to institute a suit for damages under the anti-trust laws (R. 138).

He then testified to a similar conversation with Mr. Moskowitz of Loew's at approximately the same time, the substance of which was practically the same as that with Mr. Kingsburg. Mr. Moskowitz told him definitely that they were not being discriminated against (R. 143). There

was no evidence other than these two visits made to the two executives of RKO and Loew's by the petitioners in respect to their alleged claim of exclusion in the metropolitan area.

Mr. McMillan testified that William Heineman, Vice President in charge of Eagle Lion Films, was present with him on these visits. Mr. Schwalberg and Mr. Heineman during the period in question were the vice-presidents in charge of sales. Referring to Mr. Heineman, counsel for petitioners, stated to the Court (R. 153-154) that the vice-president unfortunately was not available as a witness.

> The Court: Why not?
>
> Mr. McGovern: He is working for United Artists at the present time.
>
> The Court: He is still available.
>
> Mr. McGovern: He is still available but obviously it is difficult to call him.
>
> The Court: I do not know why, I presume if he came he would tell the truth, wouldn't he?
>
> Mr. McGovern: I presume he would.

Neither Mr. Heineman nor Mr. Schwalberg testified. The only inference that can be drawn is that if they did testify on behalf of Eagle Lion their testimony would have been unfavorable. Rather than offer actual proof of whether or not they were excluded from the metropolitan market, tabulations were prepared in lieu thereof.

Mr. MacMillan had a chart prepared (Ex. 10, App. 647) designed to show the relationship between the film rentals that the petitioners took out of the New York area in relation to their national gross and the film rentals which the major distributors took out of the New York area in rela-

tion to their national gross. This was received in evidence as Petitioners' Exhibit No. 10, bearing the caption "Comparison of Eagle Lion Revenue with the Revenue of Major Distributors from Subsequent Run Theatres in Metropolitan New York", and a sub-caption "Ratio of Subsequent-Run Rental from Metropolitan New York to National Film Rental Less Such Subsequent-Run Rental" (R. 123). Exhibit 10 was prepared without any consideration as to whether the 196 pictures of the petitioners were in any way comparable to the 96 pictures of the respondent-distributors (R. 203-204, 384-385).

The next witness on behalf of the petitioner, Norman Gross, testified that he was an assistant to the treasurer of Chesapeake Industries and had been employed by Chesapeake since October 1951, and prior to that time he was employed by Columbia Pictures Corporation in the home office in New York for approximately six years, and the last year as office manager of the New York exchange.

In respect to the records that he prepared from which exhibits were offered in this case, he stated that they were taken from the records of Eagle Lion Exchange that comprised the metropolitan area, he examined the records and the original date, and this was done under the supervision of Mr. Malamed, the treasurer of the Company. The witness examined and tabulated the record. He testified, in substance, that the records were tabulated and were simply sheets—several hundred of them—that contained information that was taken off at the exchange from what is known as a "cut-off card". This cut-off card contained the rentals received and where the Eagle Lion pictures played in the metropolitan area (R. 198), and in respect to the 196 Eagle

Lion pictures that were distributed and released during the period in question, the tabulations in respect to film rentals were compiled in that manner.

The tabulations and exhibits that were offered in evidence from the tabulations that were prepared by Mr. Gross were made without any consideration as to the comparability of the pictures in so far as quality, type, suitability of the particular pictures, star value, timeliness of subject, or any of the other business factors that are necessary to be taken into consideration in the distribution and exhibition of motion pictures.

This witness was not connected with the sales and distribution of the Eagle Lion Pictures, was no judge of the quality of the product, and his testimony consisted only of computations and figures that came from the records of either the petitioners or from answers to interrogatories.

Mr. Gross further testified as follows:

> Q. Mr. Gross, do you have anything to do with the selling or licensing of the Eagle Lion Pictures in the City of New York? A. Absolutely nothing to do with it.
>
> Q. Now, who licensed the circuits here? A. I don't even know that (R. 601).

In an effort to offer some testimony that petitioners were unable to get additional business from independent producers, Leon Kaplan, an attorney of Los Angeles, California, who was California counsel in certain matters for the petitioners, testified (R. 537, 560). He testified that to his knowledge Eagle Lion did receive the product of 15 or 20 independent producers for distribution during the period

in question (R. 540). His testimony tended to show that basically the petitioner was a weak distribution company, and that the producers that came to him were more interested in securing moneys for the cost of production rather than primarily to secure the benefits of the distribution from this weak distributing company.

John Peoples, a partner in Peat, Marwick, Mitchell & Company, certified public accountants, testified that he had made a summary of the operations of Chesapeake Industries, Inc. with respect to the operation of the motion picture subsidiaries. These statements were marked Exhibit 24 (R. 427), and showed for the motion picture producing and distributing company losses in every phase of their business during the period in question, and it was done on a worldwide basis. There was absolutely no proof offered that any part of this worldwide loss was occasioned by anything of which petitioners were claiming existed in the New York area, and the only inference, if any, that could be drawn from this exhibit was that it was a poorly managed production and distribution company, without quality products, which was reflected by the losses demonstrated by this exhibit (R. 430).

Neil Agnew was the last witness for the petitioners and added nothing to the probative value of the petitioners' case. He testified that he was familiar generally with the Eagle Lion product during this period, but could give no opinion as to what they would be expected to perform at the box office in the New York metropolitan area or outside the New York metropolitan area (R. 914).

Petitioners' exhibits, other than the Exhibit 24, were statistics that were compiled by Mr. Gross and offered

either during the testimony of Mr. Gross or Mr. MacMillan, or where figures that were submitted to the respondents and offered and received without the foundation of oral testimony.

Petitioners' Inadequate Proof of Damages

The only evidence offered by the petitioners in support of their purported claim for damages was Petitioners' Exhibit 10 (*supra*). This exhibit dealt with the ratio of revenues from subsequent runs in the New York subsequent run area to revenues from the remainder of the United States. One ratio was calculated for the petitioners, and another similar ratio was calculated for eight other distributors taken together, and in each case the ratio was for the season 1946-1947 through 1949-1950. These ratios showed the following:

That the petitioners took 6.4% of their revenue out of the New York subsequent run area and the eight distributors took 8.9% of their revenue out of the subsequent run territory in metropolitan New York (R. 124). This was arrived at by comparing the profits of the 196 features distributed by the petitioners and the selection of 96 features out of the eight distributors. The data for the Eagle Lion product was prepared by Mr. Gross from Eagle Lion records, and the data for the eight distributors was prepared from answers to interrogatories of these eight distributors when they were defendants in this case (R. 126). This we will refer to as the "Gross Method of Calculation." The national grosses for the Eagle Lion pictures varied from $2,008 to $1,985,000. Those of the eight distributors varied from $46,900 to $5,459,500. The petitioners' calculation included 177 pictures that grossed below $500,000.

Using the same identical ratios for calculation as used by Mr. Gross in arriving at the percentage, but comparing these groups of films having comparable rentals, the evidence shows the following:

The 177 Eagle Lion pictures which had an aggregate national film rental not in excess of $500,000 had a better return from the New York metropolitan subsequent runs than did the films of the eight distributors in the same national bracket. This was conceded by the witness Gross (R. 494-501, Loew's Ex. B.). The remaining 19 films each had a national rental of over $500,000 and received the best playing time and playing position to which its merits entitled it in the RKO and Loew's neighborhood theatres.

Therefore, using the same method of calculation that petitioners have in Exhibit 10, we find uncontradicted the following:

That 177 pictures of the petitioners did better in New York than the eight major distributors, and that there was absolutely no discrimination of any kind or character in respect to the remaining 19 pictures. They received the runs they were entitled to at the RKO and Loew's neighborhood theatres, grossed over $500,000, and substantial film rentals were paid by RKO and Loew's to the petitioners.

Evidently recognizing the weakness of the above proof in respect to damages, the following exhibits were received in evidence: Exhibits 27, 28, 32, 33, 34. These exhibits in no way either bolstered or supported petitioners' proof of damage. The comparisons used in these exhibits are misleading, and should have no weight in establishing evidence of damage.

In the light of Loew's Exhibit B and RKO's Exhibit A, and the additional evidence presented by respondents RKO and Loew's, it affirmatively appears that neither has a conspiracy been proven nor damages suffered by the petitioners as a result of any alleged conspiracy. There was no loss to the petitioners as a proximate result of any violation of the anti-trust laws by either of these respondents.

Summary of Proof Offered by Respondents

Robert L. Miller, a statistician in the employ of respondent RKO during the period in controversy, testified that he prepared the figures from the records of RKO and those of Eagle Lion that were offered to him, and upon the basis of those records compiled the necessary data for the RKO exhibits that were offered in evidence.

RKO's Exhibit A

This exhibit presents a complete picture of the play-off of Eagle Lion pictures on a first run in New York and the various percentages and ratios arrived at in the last method of calculation being that used by Mr. Gross.

RKO's Exhibit B

In this exhibit Mr. Miller compiled a list of every picture of Eagle Lion pictures out of 196 that were screened by RKO during the period in question, and testified that during this period the pictures of all other distributors were screened (R. 624). 129 pictures, according to Exhibit B, were screened. Of the pictures that were not screened, 42 were westerns. Mr. Miller further testified it was not the policy to screen all westerns as these were usually a part

of a series, and after screening one or two it was not necessary to screen the others. 25 re-issues were not screened because they were, in all probability, screened when the picture was originally released (R. 629-630).

RKO's Exhibits C, C-1, C-2, C-3, C-4

The following shows the play-off of the Eagle Lion pictures in the RKO neighborhood theatres:

Exhibit C —Destination Moon

Exhibit C–1—Red Shoes

Exhibit C–2—The Jackie Robinson Story and The Story of GI Joe

Exhibit C–3—Rebecca and the Paradine Case

Exhibit C–4—Arabian Nights and Sudan, Canon City and Raw Deal (R. 632-640).

RKO's Exhibit D

This exhibit shows the number of pictures played in the RKO metropolitan sub-run from 1946 to 1950, and the names of the companies from whom they were licensed:

The total for the season					1946-1947	was	526
"	"	"	"	"	1947-1948	"	469
"	"	"	"	"	1948-1949	"	485
"	"	"	"	"	1949-1950	"	525
					Making a total pictures of		2,005

and these pictures were licensed from thirty-odd distributors (R. 737-38).

Note: Loew's comparable Exhibit E showed that during the period in question Loew's licensed pictures from 38 distributors.

This exhibit further shows that during the period in question RKO theatres exhibited 111 Eagle Lion pictures. Loew's comparable exhibit (Loew's Exhibit E) showed that during the period in question Loew's exhibited 110 Eagle Lion PRC pictures in their metropolitan theatres.

Sol A. Schwartz, president of RKO Theatres, testified that he had been associated with the RKO respondent and its predecessors since 1922. He started with the Company in a secretarial position; from that position he became an assistant manager of a theatre, and then a district manager, a zone manager; then to the position of vice-president. On January 1, 1951, he was elected president. RKO, during the period in question, operated approximately 35 theatres on a first neighborhood run in the metropolitan area. He further testified during this period there were other theatres in the metropolitan area that were exhibiting pictures on a neighborhood first run (R. 675-678). He supervised, during this entire period, the management and operation of the RKO theatres.

He testified that RKO Theatres maintained an efficient booking department consisting of several people under his direction whose duties were to buy films for these RKO theatres. That prior to the showing of pictures at the RKO theatres, they were screened not only by the film department, but members of the advertising department before decisions were made. The screenings were held daily, and were an important work of the men who were responsible for the booking and buying of pictures (R. 679).

After the pictures were screened, they were solicited by film companies as to the buying and dating of pictures. There were regular series of negotiations with the repre-

sentatives of distributors before deals were consummated. The determining factor whether the pictures were to be bought was gone over carefully by people experienced by trial and error of many years as to what type of pictures would appeal in certain neighborhoods and would appeal to the largest percentage of people that they thought they could attract to the RKO theatres (R. 680). They were desirous of booking for exhibition pictures that were not only suitable, but would produce the best revenue for the theatre and for the companies, and would proceed to try to get that picture through negotiations with the distributor (R. 681).

Joseph R. Vogel, president of Loew's Incorporated, and in charge of Loew's theatre operations, testified to that respondent's general method of purchasing films, and the business considerations involved in licensing pictures in the Loew's theatres (R. 785), more particularly the licensing of Eagle Lion pictures in the Loew's theatres (R. 809).

The testimony of both Mr. Vogel and Mr. Schwartz was absolutely uncontradicted, and the record is abundantly clear from this testimony that the petitioners' pictures received not only fair treatment from the respondents, but any picture of Eagle Lion that was of sufficient quality received the play-off in either the Loew's or RKO houses that it was entitled to.

Mr. Russell Downing, president and managing director of Radio City Music Hall, testified as to the method pictures were selected for exhibition at the Music Hall (R. 888); and further testified that the Music Hall was open to any distributor who had a picture of sufficient merit to show there (R. 890); that he had knowledge of the

product of Eagle Lion during the period 1946-1950; that at Eagle Lion's request the picture "Tulsa" was screened, and he went to a screening of "Destination Moon," and that these were the only pictures that Eagle Lion requested them to screen, and that they did not play any Eagle Lion pictures at the Radio City Music Hall because they did not measure up to the standards of quality required by the Music Hall (R. 893-894).

The Testimony of Max D. Youngstein

Mr. Youngstein, who has been connected with the motion picture industry for over sixteen years, is presently vice-president and co-owner of United Artists (R. 860), testified that in 1946 he joined Eagle Lion Films as advertising, publicity and exploitation director (R. 861), and continued with them until May of 1949. He further testified that he is familiar with 196 pictures that Eagle Lion were distributing during this period, and that he was in charge of their promotion and advertising (R. 863). In respect thereto, he gave the following testimony:

> Q. In your capacity as vice-president in charge of those activities were you also familiar with the product of other distributors, such as, for example, Paramount, Metro-Goldwyn-Mayer, United Artists, Universal, Columbia, and Allied or Monogram, Republic and so forth? A. Yes.
>
> Q. And RKO, excuse me. I slighted one of them. Could you, Mr. Youngstein, with your knowledge of that product and the knowledge of the product that you were charged with promoting, could you tell us the relative box office appeal of the product of Eagle Lion as compared to the product of the distributors that I have mentioned? A. I would

say, with the exception of Monogram that we would be at the very bottom rung of the ladder.

Q. And you worked on the promotion of this product as well as you could, isn't that correct? A. I had to appraise these pictures, yes, because it is a competitive situation. I had to.

Q. You were promoting these pictures not only in New York but across the country as a whole, is that correct? A. Yes, New York, across the country as a whole and, to some extent, in our worldwide distribution, wherever we did have distribution releasing setups outside of the United States.

Q. Are you in a position to appraise the relative box office appeal of these Eagle Lion pictures in the New York market as compared to the pictures, let us say, of Metro-Goldwyn-Mayer, Paramount, RKO, Warner, Universal, United Artists? A. At the time between 1946 and 1949?

Q. Correct. A. I would say that in my opinion, and this is a matter of opinion, no one can be very exact on this, but in my opinion, they were much inferior to the companies you outlined.

Q. So far as box office appeal in the New York area. That is what my question is directed to. A. Much inferior.

He was then shown respondent Loew's Exhibit F, which included the 18 Eagle Lion pictures that grossed more than $500,000 and that showed either the Loew's or the RKO theatres first neighborhood run (R. 866). After looking at the exhibit, the record disclosed the following (R. 867-868):

Q. Would you tell us, Mr. Youngstein, from your knowledge of those pictures and the relative market of available pictures whether in your opinion these pictures received the playing time or the playing

position that they were entitled to receive, having in mind the merits of those pictures?

Mr. Wright: Of course, I think, if I might point out at this time, there is not the slightest foundation laid for any competence on this witness' part to say where any picture belonged or did not belong in these circuits in New York or anywhere else. It was, apparently, not part of his job to negotiate film contracts. He was concerned wholly with * * * and exploitation.

The Court: Here is a man who has had a long experience, who was in Eagle Lion, and a lot of other companies, and he is being asked whether in his opinion from that experience they played in the right relative position. I think he is sufficiently qualified to give an opinion on it. You may cross-examine him on it.

Mr. Wright: We have no objection, of course, to his giving an opinion about the pictures as such. This is a somewhat narrower opinion as to what particular position they should have had.

The Court: I would assume that a man who is in charge of publicity and promotion for a company is qualified to have some opinion as to whether the picture is being exploited as it should have been exploited. I will allow him to answer the question.

Do you want the question read?

Mr. Gillespie: If you would like, I could rephrase it.

The Court: I think we can have it read.

(Question read)

A. I would say Yes, in view of what the competitive situation was at the time and the pictures available from other companies.

And at (R. 881-882-883), in response to two questions by the Court, testified as follows:

By the Court:

Q. You say these Eagle Lion pictures didn't have as great an appeal as the pictures of the other companies, the other major companies? Was that true generally throughout the country? A. Yes, it was true generally throughout the country but in different degrees. You would have to take pictures almost one by one and analyze them on the basis of their particular appeal. It is very frequent that a picture can do well outside New York that will have no great interest in New York. The reverse of that is also true. That is true not only of Eagle Lion but any other company in the business. There are pictures called pictures that are made for the sticks. I didn't say that derogatorily, but there are pictures like Ma and Pa Kettle which would show a tremendous disproportion in what they would earn outside of New York as against what they would earn in New York.

The Court:

Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York? A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the metropolitan territory. That is the entire metropolitan territory. The newspapers have that importance.

> The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that receive terrible reviews in New York, they receive very bad trade paper reviews. They are pictures which I would say would do much better outside of New York than in New York.

The above testimony by a former executive of Eagle Lion who had actual first-hand knowledge of the petitioners' 196 pictures further establishes the fact that petitioners' difficulties were due solely to the poor quality of what petitioners were trying to sell and not to any combination and conspiracy between the respondents.

Petitioners Have Failed to Prove Damage or Loss as a Result of Any Alleged Violation of the Anti-Trust Laws by Either of the Respondents RKO or Loew's

(a) The Paramount Decree.

The findings of fact and conclusions of law in the case of *United States* v. *Paramount, et al.*, were marked and received in evidence as petitioners' exhibits. Particular stress was placed by the petitioners on Finding 154(D). For this decree to have any probative value, it is incumbent upon the petitioners not only to show that there was a continuance of the conspiracy during the period in question, but they must further prove the impact of this conspiracy in respect to the particular local situation. The type of proof offered by the petitioners does not show a continuance of any conspiracy; nor does it remotely show any impact on the petitioners as a result of any such finding in the *United States* v. *Paramount*, more particularly Finding 154(D).

The exhibits offered in evidence by the petitioners do not show a continuance of any violation of the *Paramount* decree by these respondents, and the evidence introduced by the respondents affirmatively proves there was no conspiracy to exclude petitioners' films from their first subsequent run theatres. The petitioners received fair treatment in dealing with the respondents, and that the respondents herein acted independently and dealt with the petitioners' pictures as they dealt with the pictures of other distributors. One cannot help but quote the late Judge Hand's observation prior to the entry of the *Paramount* decree when he stated on the record:

> "• • • This business of using a pretty obscure decree and decisions, as they have tried to do before, to lick somebody in litigation between themselves and other parties is crude judicial stuff, from the point of view of a judge, very, very crude stuff."

Regardless of the admission of the decree and findings in *United States* v. *Paramount Pictures, Inc.*, the appellants must prove that the respondents actually conspired to exclude the petitioners from the opportunity of license on a competitive basis of feature motion pictures to the Loew's and RKO theatres in the New York metropolitan area on runs subsequent to first-fun Broadway. This was made clear in the recent case of *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954), in which the Supreme Court stated:

> "• • • But the Paramount decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved • • • the Paramount decree alone could not support a recovery by petitioner."

See also,

Emich Motors v. *General Motors, supra,* 340 U. S. 558;

DeLuxe Theatre Corporation v. *Balaban & Katz Corp.,* 95 F. Supp. 983;

Monticello Tobacco Company v. *American Tobacco Co.,* 197 F. 2d 629.

(b) The burden of proof is on the petitioners to show affirmatively that their damage was proximately caused by a conspiracy between Loew's and RKO Theatres to exclude the petitioners from the New Metropolitan area on runs subsequent to first-run Broadway.

Turning now to the question of conspiracy, it is first to be noted that the essence of a conspiracy is an agreement. The burden of proof is on the petitioners to affirmatively show that there was an agreement, either tacit or expressed, between the respondents Loew's and RKO to exclude the petitioners from the opportunity of licensing their pictures on a competitive basis in the New York metropolitan area on runs subsequent to first-run Broadway. There is no proof of any expressed agreement; neither is there any affirmative proof of a tacit agreement. There are no facts and circumstances that would support any such inference. The burden of proof being upon the petitioners, if the proven facts give equal support to each of two inconsistent inferences, *i.e.,* whether respondents did or did not conspire, judgment must be against the petitioners (*Penna. R. Company* v. *Chamberlain,* 288 U. S. 333, 339).

The petitioners must show more than conscious parallel action; he must prove an agreement. Moreover, similar business solutions, dictated by similar business considera

tions, cannot support an inference of conspiracy if the solutions are reasonable.

This was recently made clear in *Fanchon & Marco* v. *Paramount Pictures, Inc.*, 100 F. Supp. 84, aff'd 215 F. 2d 167. Petitioners contended that they had proven a conspiracy by showing a uniformity of action among the respondents. In entering judgment for the respondents, the Court said:

> "* * * No parallelism, conscious or unconscious can overcome a finding of reasonableness. And it is not our function in this type of action to secure a better bargain for a dissatisfied exhibitor. Our sole aim is to vindicate the anti-trust laws in so far as their violation may have brought injury to the plaintiff. What has gone before indicates clearly the factual and legal foundations for the conclusion that there has been no violation of the anti-trust laws by the defendants which has resulted in actionable injury to the plaintiff."

The petitioners must establish that they have suffered an economic loss which is a direct and proximate loss from the respondents' alleged illegal act. No presumption of injury arises from the mere fact of conspiracy. Injury must be specifically proven by the petitioners.

In *Beegle* v. *Thomson*, 7 Cir. 138 F. 2d 875, 881, certiorari denied 1944, 322 U. S. 743, 64 S. Ct. 1143, 88 L. Ed. 1576, the Court states, at page 881:

> "Allegations of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the fact from which injury accrued and upon which

> damages may be assessed as well as those with regard to the effect of the alleged violations upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."

And in *Hart* v. *B. F. Keith Vaudeville Exchange,* 12 F. 2d 341, Cert. Den. 273 U. S. 703, the Court said (p. 345):

> "The plaintiff who seeks recovery must bear the burden of proof, not only that there was an attempt or actual monopolization or a combine or conspiracy in violation of the anti-trust law, but it must be shown that there was injury to him as a proximate result. Jack v. Armour & Co. (C. C. A.) 291 F. 741; Rice v. Standard Oil Co. (C. C.) 134 F. 464."

See, also

Gerli v. *Silk Association of America, et al.,* 36 F. 2d 968;

Westmoreland Asbestos v. *Johns-Manville Co.,* 30 F. Supp. 389;

Brownlee v. *Malco Theatres,* 99 F. Supp. 312;

Twin Porta Oil Co. v. *Pure Oil Co.,* 8 Cir. 119 F. 2d 747; and

Alexander Milburn Co. v. *Union Carbide and Carbon Corp., et al.,* 15 F. 2d 678.

There has been a complete failure of proof on the part of the petitioners to show any causal connection that any alleged damages to the petitioners were caused by any acts of the respondents.

The record before this Court clearly indicates that there was no illegal agreement between the respondents and no damage to the petitioners caused by the respondents' alleged violation of the anti-trust laws.

Petitioners in their brief in this application, referring to Judge Waterman's opinion in the Court of Appeals "at page 10 instead of looking to the entire record to determine what 'matters' had been decided, this opinion discussed only a single finding (154(d)) and a single conclusion of law (C. 16) concerning the New York market."

The exact quotation from Judge Waterman's opinion may be found at p. A.8 of the Appendix:

> "After examining Finding No. 154(d) and Conclusion No. 16, as well as the other portions of the *Paramount* record that were relied upon by plaintiffs, the trial court, see 141 F. Supp. at 667, concluded that 'while the findings may perhaps constitute evidence * * * that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case.' "

and in the footnote on the same page:

> "In addition to Finding No. 154(d) and Conclusion No. 16, the appellants call our attention to Findings No. 84, 99, 100, 127, 147(c), 156(b), and 158, and Conclusions No. 7 and 12 of the final decree in the *Paramount* case, Equity No. 87-273, S. D. N. Y.,

> filed Feb. 8, 1950, aff'd, 339 U. S. 974 (1950). We have examined these findings and conclusions, as well as the many other findings and conclusions embodied in that decree. We conclude that their relevance to the issues here in suit is even less than that of Finding No. 154(d) and Conclusion No. 16, which are discussed in detail in our opinion *infra*."

The Petitioners failed to produce the best available evidence for the trial either on the question of conspiracy or on the question of damage. Not a single witness was called to show that the Petitioner Distributors in this case had any quality merchandise to offer for exhibition in respondents' theatres. They did not show through their former General Sales Managers any effort to license their motion pictures for exhibition in respondents' theatres, although these witnesses (Schwalberg and Heineman) were available in New York City at the time of the trial. The only inference that the Trial Court could draw from their failure to produce the men charged with the duty to distribute their pictures in this area was that these witnesses could not testify favorably to Petitioners claim, but would further support the testimony of Max Youngstein who was in charge of the exploitation of the petitioner distributors' pictures, not only in the New York area but throughout the whole country.

On the other hand, the respondents offered overwhelming evidence as to the lack of quality in most of the petitioners' pictures; that the respondents, Loew's and RKO, were always on the alert for good pictures for exhibition; and that each of them during the alleged damage period played motion pictures in their New York metropolitan neighborhood theatres distributed by over thirty separate and dis-

tinct distributors of motion pictures. The trial court heard all the evidence, examined all the exhibits, admitted the *Paramount* decrees and wrote a clear-cut understandable opinion which completely disposed of the case on the merits.

In respect to the opinion written by the Trial Court on p. 4 of Petitioners' brief in the Circuit Court of Appeals, we find the following: "The opinion below accurately states those evidentiary facts to which it refers."

There is nothing in the majority decision of the Court of Appeals for the Second Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised by the Petitioners which should be settled by this Court.

Paramount Film Distributing Corp. v. *Applebaum*, 349 U. S. 961 (1955);

Harrison v. *Paramount Pictures*, 348 U. S. 828 (1954);

G. & P. Amusement Co. v. *Regent Theatre Co.*, 349 U. S. 904 (4/19/55);

Fanchon & Marco v. *Paramount Pictures*, 348 U. S. 912 (1955);

Dipson Theatres v. *Buffalo Theatres*, 342 U. S. 926 (1952);

Fifth & Walnut v. *Loew's, Inc.*, 338 U. S. 940 (1950);

St. Louis Amusement Co. v. *Paramount Pictures*, 335 U. S. 854 (1948);

Momand v. *Universal Film Exchanges*, 336 U. S. 967 (1949).

CONCLUSION

A Writ of Certiorari should not issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Plaintiffs,

—against—

LOEW'S INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP.,

Defendants.

Appearances:

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Appendix A

DAWSON, *D.J.*:

This is an action tried by the Court without a jury wherein the plaintiffs seek treble damages under the anti-trust laws, 15 U. S. C. 1, 2, 15, against Loew's, Inc. (hereinafter called "Loew's") and RKO Theatres, Inc. and RKO Film Booking Corp. (hereinafter called "RKO").

PROCEEDINGS PRIOR TO TRIAL

The complaint was filed on October 3, 1950. It named as defendants all of the distributor defendants named in *United States* v. *Paramount Pictures, Inc.** (hereinafter called the "Paramount case"). As to the distributor defendants, it sought injunctive relief. As to the present defendants, it sought injunctive relief and treble damages in the amount of $15,000,000 plus attorneys' fees.

In the original complaint, Eagle Lion Classics, Inc. was named as one of the parties plaintiff. In 1951, this corporation was sold to United Artists Corp., one of the distributor defendants. Following a settlement of disputes which arose over the contract of purchase, Chesapeake Industries, Inc., the parent corporation among the plaintiffs, gave United Artists a release on December 31, 1953. Thereafter, on the defendants' motion, Judge A. N. Hand dismissed the complaint, 121 F. Supp. 128, on the grounds that the sale of Eagle Lion Classics, Inc., the only party plaintiff threatened by the conspiracy, made the claim for injunctive relief moot, and that the claim for damages against the exhibitor defendants had been released by the release of one joint tortfeasor without reserving rights against the others. The

* 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1946), reversed and remanded in part, 334 U. S. 131 (1948); 85 F. Supp. 881 (1949), aff'd 339 U. S. 974 (1950).

plaintiffs appealed the dismissal of the complaint, insofar as it related to the damage claims. The Court of Appeals reversed on the ground that none of the claims for damages was the subject of the release, 219 F. 2d 196 (Feb. 1, 1955). This action, therefore, involves only the claim for damages against the two remaining defendants, Loew's and RKO.

The Issues

The complaint is based exclusively on alleged violations of the anti-trust laws. The issues were framed in a pre-trial order entered by Judge Ryan of this Court on November 2, 1953. Such issues must, in the absence of modification, control the subsequent course of the action (Calendar Rule 18, S. D. N. Y.). The issues as set forth in the pre-trial order are as follows:

"1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?

"2. If so, were the plaintiffs directly damaged in their business or property as the result of the said illegal combination and conspiracy and, if so, in what amount?"

Appendix A

The Facts

1. *The parties*

There are four affiliated parties plaintiff (referred to herein as "the plaintiffs") to the present suit:

Eagle Lion Studios, Inc.—a California corporation engaged in the business of producing motion pictures up to 1949;

Eagle Lion Films, Inc.—an Ohio corporation engaged in the business of distributing the films produced both by its affiliate (above) and by other producers from 1945 until June, 1950;

PRC Productions, Inc.—a Delaware corporation organized in 1943 and engaged in the business of producing motion pictures until 1946 when all of its assets were transferred to Eagle Lion Studios, Inc., above; and

Chesapeake Industries, Inc. (formerly Pathe Industries, Inc.)—an Ohio corporation which owns all of the stock of the other three parties plaintiff.

There are at present three defendants:

Loew's Inc.—a Delaware corporation, now engaged in the business of producing and distributing motion pictures and formerly, at the times material to this action, engaged in the exhibition of motion pictures in theatres owned or controlled by it either directly or through subsidiaries;

RKO Theatres, Inc.— a New York corporation engaged in the business of exhibiting motion pictures in theatres owned or controlled by it; and

RKO Film Booking Corp.—a New York corporation engaged in the business of booking films for exhibition.

Appendix A

Originally there were six other defendants, all nation-wide film distributors, but the action was dismissed as to them.

The defendants are corporations which operate those motion picture theatres in metropolitan New York which are known, respectively, as the Loew's and RKO circuits.

2. *Area involved in the action*

The New York metropolitan area, which under the pre-trial order is the area involved in this action, is defined in the complaint as "the five boroughs of greater New York City, southern portion of Westchester County and western portion of Nassau County, New York State". No part of the State of New Jersey is included in the New York metropolitan area, as defined in the complaint and in the interrogatories submitted by the plaintiff.

3. *Period of time involved in the action*

The complaint alleged that the conspiracy which caused it damage began prior to 1944, but it was stipulated that the only claim for damages was in the period from September 1, 1946 to September 1, 1950. The action was instituted on October 3, 1950.

4. *The activities of the plaintiffs prior to September 1, 1946*

In 1943, PRC Productions, Inc. was created to produce low budget pictures, and PRC Pictures, Inc. was created to distribute those low budget pictures. In 1946, PRC Pictures, Inc. was dissolved, and its distribution activities were assumed by Eagle Lion Films, Inc. and its assets were transferred to Eagle Lion Studios, Inc. In that year, the parent company, Chesapeake Industries, Inc. (then known as Pathe Industries, Inc.) decided to make and dis-

tribute higher budget pictures, and determined that its subsidiary, Eagle Lion Studios, Inc. would produce them and Eagle Lion Films, Inc. would distribute them. This was in part because of the fact that in 1945, an informal agreement was reached with the J. Arthur Rank organization of England which provided, in effect, that Chesapeake Industries, Inc. would produce a minimum of five pictures a year for distribution by the J. Arthur Rank organization in England and other areas, and that the English company would produce five pictures to be distributed by Chesapeake Industries, Inc. or its affiliates. This agreement was reached informally in 1945.

In September, 1946, Chesapeake created Eagle Lion Films, Inc. to distribute the pictures in accordance with this contract, and in November, 1946, created Eagle Lion Studios, Inc. to produce the pictures. The agreement with the J. Arthur Rank organization was not formally signed until April 18, 1947. Eagle Lion Studios, Inc. was put into funds to take over the production facilities of a studio in Hollywood, California, and a million and a half dollars was invested to put it in condition to make these pictures. Eagle Lion Studios, Inc. continued to make some low budget pictures and some westerns, but also embarked upon a program of making some more expensive pictures.

During all of the years from 1946 through 1951, plaintiffs' motion pictures activities resulted in a loss. This loss, however, was not merely in the distribution of pictures. The figures introduced in evidence showed that in this five-year period, the average annual loss of the plaintiffs was $2,271,573 in its production activities, and $495,425 in its distribution activities. These figures represent plaintiffs' activities on a worldwide basis. This action is merely limited to the situation in the New York metropolitan area and in connection with the licensing of pictures on runs "subsequent" to first run theatres.

Appendix A

5. *Subsequent run theatres*

"Subsequent run" means all theatres except the approximately 40 first run theatres principally concentrated in the Broadway midtown area and includes first subsequent run, second subsequent run, and so forth. The total number of subsequent run theatres in the area involved and in the period involved has been variously estimated at from 600 to 800. Subsequent run theatres are frequently called "neighborhood theatres".

Of these subsequent run theatres, there were during 1946-1950 operating on a first neighborhood run basis some 44 or 45 theatres belonging to Loew's, some 31 to 36 theatres belonging to RKO, and some 17 others. Loew's also operated 13 or 14 second neighborhood run theatres, and RKO operated from 1 to 3 second neighborhood run theatres. First run neighborhood theatres were theatres which ordinarily displayed the pictures following a run in the first run theatres. However, there were times when pictures would be shown in the first run neighborhood theatres even though they had not been shown in first run theatres. The plaintiffs have not complained of any discrimination against their pictures in the first run theatres, but base their complaint solely upon the failure to license their pictures for the first run neighborhood theatres of the RKO and Loew's chains.

In addition to the Loew's and RKO circuits, there were in 1948 seven other subsequent run circuits in the area comprised of between 29 and 78 theatres each and totaling altogether some 252 theatres.

In the event that a picture did not play on a first neighborhood run circuit, it became that much more difficult to play in subsequent run theatres. By the same token, if a picture did not play in a first run theatre in the Broadway area, it became that much more difficult to secure a com-

mitment for the showing of the picture on the first neighborhood run circuit.

In addition to the theatres above described, there was another group of theatres known as the "art" theatres which customarily played single films instead of double features, usually at a higher admission charge than a first run neighborhood theatre, and frequently played foreign films.

6. *Films distributed by the plaintiffs*

In the period in question, there were distributed by the plaintiffs 195 pictures; one picture "Red Shoes" was distributed twice so that in some of the evidence, the total is given as 196 pictures.

7. *Method of selling pictures*

The general procedure for selecting pictures to be exhibited either on the circuits or in individual theatres is for the company which is distributing them to make arrangements for the exhibition of the picture in a projection room maintained by the exhibitor. These exhibitions are known as "screenings". Thereafter, the exhibitor discusses the terms that it is willing to pay for the picture and how the picture is to be displayed, and negotiations take place for the price to be paid for the picture. The circuits in the New York metropolitan area customarily had changes of pictures twice a week. Some pictures were shown on the "long half" which meant that the picture played approximately five or six days a week, and some played on the "short half" which meant that the picture played one or two days of the week. Generally, two pictures were played together with one receiving "top billing". Sometimes the two were given equal or "split billing". Ordinarily the distributor received a percentage of the gross admissions

receipts only for the pictures playing the top of the long half, or a split billing of the long half. For the rest it received a flat rental and this was regarded as less favorable.

8. *Screenings of the pictures distributed by the plaintiffs*

The undisputed testimony was that of the 195 pictures distributed by the plaintiffs in this period, Loew's "screened" not less than 108 pictures and RKO "screened" at least 129 pictures. No contention has been made that the defendants refused to "screen" these pictures with a view toward seeing whether they would be purchased by them. Plaintiffs concede, for example, that defendants "screened" all of plaintiffs' pictures made available to it for that purpose.

9. *Eagle Lion Pictures exhibited by the defendants*

Of the 195 pictures distributed by the plaintiffs during the period in question, the defendants exhibited 85 pictures on one or the other of its circuits in the New York metropolitan area. The playing terms of the 85 were as follows:

No. played long half top or split billing	8
No. played long half second billing	24
No. played short half	53
Total	85

Each of the defendants exhibited certain other pictures distributed by the plaintiffs in one or more theatres amounting to less than the full circuit. Loew's played some 39 additional pictures in addition to the 50 which it played on the entire circuit. RKO exhibited in one or more of its theatres during the period in question some 55 additional pictures. The evidence shows that during the period in

question, Loew's licensed pictures from 38 distributors and RKO licensed pictures from over 30 distributors.

10. *Sale of plaintiffs' distribution business*

Plaintiffs, throughout their entire history, have been weak companies. During the years 1946 through 1951, the plaintiffs lost over $13,000,000 in the production of films and nearly $3,000,000 in the distribution of films. These losses were admittedly not the result of any competitive situation which might have existed in subsequent run theatres in the greater New York metropolitan area. Plaintiffs contend that their damages in that area would have been only $417,000.

As a matter of conceded fact, plaintiffs had enough pictures to operate at a profit only during the last six months of 1950 when Eagle Lion obtained a substantial number of additional pictures through merger negotiations with Film Classics. The additional revenue from these additional pictures "began to die out" early in 1951, as stated by the President of Chesapeake Industries, Inc., and the distribution business was sold to United Artists Corporation. The loss on this sale was computed by the accountant called as a witness by the plaintiffs as $146,440.

Although plaintiffs had been losing money throughout their entire history, the amount of total gross film rentals which they received was not insignificant. In the seasons 1946-1947 through 1949-1950, plaintiffs earned total gross film rentals on the 195 films which they distributed of $39,107,800 in the domestic market, of which $2,362,200 was received from neighborhood theatres in the greater New York metropolitan area.

Appendix A

11. *Nature of the Eagle Lion pictures*

The 195 Eagle Lion pictures included about 40 "Westerns", 43 foreign films which were made abroad, and 26 re-issued films. A re-issued film is one which has been distributed through the Country and which is later released, at the discretion of the distributor, for further distribution and exhibition. A reissued film was ordinarily not played on a first neighborhood run basis. Few of the foreign made Eagle Lion films were shown in the circuits of the defendants. These films were customarily shown in the so-called "art" theatres not affiliated with either circuit. However, all foreign made Eagle Lion films grossing less than $500,000 took 13.2% of their total domestic rental out of neighborhood theatres in the New York metropolitan area, which was substantially greater than the percentage of rental received from this area by all Eagle Lion films.

12. *Ratio of subsequent run rental from metropolitan New York to national film rental*

The ratio of subsequent run rental from metropolitan New York to national film rental, less such subsequent run rental, was as follows:

Eagle Lion

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
97	Under $100,000	6.9%
51	100,000 to 200,000	5.4%
10	200,000 to 300,000	6.7%
16	300,000 to 400,000	5.9%
3	400,000 to 500,000	8.6%
18	Over 500,000	6.7%
195		6.4%

Appendix A

8 Distributors*

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
7	Under $100,000	5.2%
10	100,000 to 200,000	4.9%
7	200,000 to 300,000	6.6%
6	300,000 to 400,000	5.1%
5	400,000 to 500,000	7.1%
61	Over 500,000	9.2%
96		8.9%

* These were not all the films distributed by the 8 distributors in the four-year period, but were median pictures selected as representative of the entire distribution by the plaintiffs in preparing their statistical studies.

13. *Pictures available for exhibition*

The circuit of each defendant used only about 104 features per year as its long half attractions, being two features per week per circuit. The eight major distributors distributed, in the four year period, over 1,000 features, or more than 250 features per year. Eagle Lion distributed in that four-year period a total of 195 pictures.

Discussion

The primary issue in this case is, in the language of the pre-trial order,

> "Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit fea-

ture motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?"

No proof was offered that plaintiffs were entirely excluded from licensing their pictures to these theatres in that area. As has heretofore been shown, many of their pictures were in fact licensed for exhibition to the Loew's and RKO circuits in New York. The only question would be whether plaintiffs were excluded from the opportunity of licensing such pictures "on a competitive basis". This would involve the question as to whether, in the licensing of their pictures, plaintiffs were discriminated against so that they did not have an equal competitive opportunity.

Plaintiffs offered no direct proof that there was, in fact, any combination or conspiracy between the defendants to deprive the plaintiffs of an equal competitive opportunity to license their films. The presidents of both defendants denied explicitly that there was any agreement between the defendants relating to the licensing of pictures of the plaintiffs or that either of them knew about the negotiations which the other had with reference to licensing pictures from the plaintiffs. Plaintiffs offered no testimony of any of their sales executives with reference to efforts made to secure licensing of pictures distributed by them during the period covered in the complaint from which any inference could be drawn that they were discriminated against. The only testimony of an officer of the plaintiffs was the testimony of Mr. MacMillen, the president of Chesapeake Industries, Inc., who stated that he "personally had nothing to do with the sale or distribution of pictures to the exhibitors", but who testified that after the decree had been entered in *United States* v. *Paramount* in the first part of 1950, he went to the offices of the defendants and complained about discrimination, saying to the president of RKO "that unless we got competitive access to the circuit we would have no alternative but to bring a suit for

damages under the antitrust laws." Whether this was a threat to secure better terms in the future from the defendants or whether it was a justifiable complaint certainly does not appear from the testimony of Mr. MacMillen who admitted that he knew nothing about the sale and distribution of pictures.

If plaintiffs had been discriminated against in the competitive licensing of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced. In fact, plaintiffs admitted that they had no complaint as to their treatment on any particular picture.

The defendants, on the other hand, called as their witness Max Youngstein, who had been in charge of "advertising, publicity and exploitation" for plaintiff Eagle Lion Films for two years from 1946. His testimony did not indicate that the treatment of plaintiffs' pictures on the circuits of the defendants was due to any effort of the defendants to deprive plaintiffs of a competitive position. He stated that the poor returns on plaintiffs' pictures was due to the fact that the films of the plaintiffs were, from the standpoint of box office appeal, at "the very bottom rung of the ladder" and "much inferior" to films which were being offered by other distributors.

The plaintiffs did not establish that they were excluded from either of the circuits or that their pictures were allocated as between the circuits. Nor have they produced any evidence which would indicate that one of the defendants consulted with the other with reference to the exhibition of plaintiffs' pictures. Plaintiffs have had several years to prepare this case for trial and ample opportunity to in-

voke the discovery processes of the Court, and if any such evidence was available, it may be assumed that plaintiffs would have secured it.

Plaintiffs, in the absence of direct proof that there was a combination or conspiracy of the defendants which deprived them of the opportunity to license their pictures on a "competitive basis", relied upon two items of proof: (1) the decree and findings of fact and conclusions of law in the *Paramount* case, and (2) the fact that the ratio of plaintiffs' receipts for subsequent run metropolitan New York theatres as compared to their national receipts differed from the average ratio of the eight major distributors.

The first question, of course, is whether the decree and the findings of fact and conclusions of law in the *Paramount* case established as a fact that the defendants combined and conspired to exclude plaintiffs from the opportunity of licensing their pictures on a competitive basis in the Loew and RKO circuits during the period involved in the action. Plaintiffs rely on §5 of the Clayton Act, 15 U. S. C. §16, which makes final judgments in government anti-trust suits "prima facie evidence" in private suits. The effect of §5 is to give the private litigant the benefit of the doctrine of estoppel by judgment as if it had been a party plaintiff to the government suit. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951). For this reason the Court accepted in evidence the decree in the *Paramount* case and the findings of fact and conclusions of law in that case.

The defendants assert that the *Paramount* case had nothing to do with the subject of the present action. In large part, that is true because the primary issue in that case related to the effect under the anti-trust laws of a combination between the large producers of motion pictures who also controlled, to a substantial extent, the places of

representative pictures of the major distributors which also received a national rental of $500,000 or less, and then similarly compare the ratios of pictures which received national rental of over $500,000, we get the following result:

Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental, less such Subsequent Run Rental

	Eagle Lion	Eight Major Distributors
For pictures having national rental of less than $500,000	6.2%	5.9%
For pictures having national rental of over $500,000	6.7%	9.2%
For entire product	6.4%	8.9%

On pictures which had a national rental of $500,000 or less, it appears that Eagle Lion did as well as or even slightly better than the eight major distributors. It is only when we come to pictures which had a national revenue of over $500,000 that a marked disparity begins, and it is this disparity in these pictures having this greater national revenue which leads to the difference in ratios for the entire product upon which plaintiffs rely as proof of a conspiracy.

The conclusion which follows from these figures thus broken down must be that Eagle Lion did as well as the eight major distributors in pictures which grossed nationally less than $500,000, and that the eight major distributors had proportionately a greater revenue in the New York area than they did nationally only in those pictures which had a national revenue of over $500,000. We should, therefore, examine the particular pictures which grossed nationally over $500,000 to see whether an inference can be drawn

that the disparity evidenced by these ratios was the result of a deprivation of equal competitive conditions from Eagle Lion, or whether it was due to other causes.

Of the 195 pictures distributed by the plaintiffs, only 18, or less than 10%, had gross national revenues of more than $500,000 while 64% of the representative pictures of the eight major distributors had revenues in excess of $500,000. Only seven of the pictures of the plaintiffs had gross national revenues in excess of $1,000,000 (and only one over $2,000,000) whereas 40 of the 96 representative pictures of the eight major distributors had gross national revenues in excess of $1,000,000, of which 18 were in excess of $2,000,000 and eight in excess of $3,000,000.

Boiling down all the statistics produced by the parties, it comes to this: 18 pictures of the plaintiffs which grossed more than $500,000 nationally did not do as well proportionately in the metropolitan New York area, as compared to what they did nationally, as the pictures of the eight major distributors that grossed more than $500,000 nationally. Was this difference due to a deprivation of an equal competitive opportunity for the plaintiffs?

All 18 of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing. This is certainly not proof of exclusion or lack of a competitive opportunity. Nor was there any proof that these pictures were entitled to a better place on the circuits.

Is the fact that these pictures did not do as well in New York as they did nationally, even though they were displayed in the circuits, proof of lack of a competitive opportunity? The fact that they did not earn as much in New York as they did proportionately in the rest of the Country is not persuasive proof that there was discrimination

against them. We must remember that we are comparing pictures of the plaintiffs which had a low national gross with pictures of the defendants which averaged nationally many times that of the pictures of the plaintiffs. We are considering two different classes of merchandise—one of a moderate grade and the other of a much higher grade—if we take their reception nationally as proof of their real worth, which is what the plaintiffs have done in using the national figures as an adequate basis of comparison.

Plaintiffs' argument would presuppose that any such merchandise, no matter what its grade, would do proportionately as well in New York as it does nationally. The economic facts of life show how fallacious is this contention. The fact that there are more Cadillacs per capita in New York, or mink coats per capita in New York, than in the Country as a whole does not establish that there is a conspiracy in New York against cheaper cars or cheaper furs. It is a consequence of the fact that the per capita wealth in the metropolitan New York area is greater than in the Country as a whole and that, therefore, there is a better market at a higher profit in that area for sales of expensive merchandise than in the Country as a whole. By the same token, the cost of living in New York is greater than in the Country as a whole, an economic fact of life which is recognized by most employers and most businesses —except, we may say parenthetically, by Congress in fixing salaries.*

Furthermore, the fact that a picture did better or worse in the Country as a whole than it did in New York is not proof that it was discriminated against in New York or

* However, in the judicial system of the State of New York, this economic fact of life is recognized, for the State Supreme Court Judges in the metropolitan area receive a salary which is $5,000 a year higher than the Supreme Court Judges in other parts of the State.

that it suffered lack of a competitive opportunity in New York. New York, with its multitude of theatres and the variety of films offered to people within easy reach of a number of theatres, may well have a theatre-going population which is more discriminating in its choice of pictures than other cities or towns where the variety of theatres and films is much less in proportion to the population; and thus a good picture may do better proportionately in New York than it does in the rest of the Country where there is not the same degree of choice available. Thus, the evidence was that the success of a picture in New York depends to a great extent upon whether it has had a first Broadway run and upon the reception accorded to the picture by the critics and that this is not comparably true in other parts of the Country.*

One test as to whether the reception of plaintiffs' films in the New York metropolitan area was due to a conspiracy

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* Mr. Youngstein, who had been in charge of exploitation, advertising and publicity of the Eagle Lion films from 1946 until May of 1949, was asked the following question by the Court and gave the following answer:

"Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York?

"A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the City alone. That is the entire metropolitan territory. The newspapers have that importance.

"The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that received terrible reviews in New York, pictures which I would say would do much better outside of New York than in New York."

of the defendants or whether it was due to the quality of the films is the reception the films had from an independent exhibitor in this area. The defendants offered the testimony of Russell Downing, the president and managing director of Radio City Music Hall, a large and representative motion picture theatre which was not in any way affiliated with, or connected with any producer or distributor. Mr. Downing testified:

> ". . . we try to avoid in the Music Hall—and I feel the Music Hall in a sense is no different from any other theatres in the area—we try to avoid playing pictures that people don't want. It is our job to find entertainment they want and we want pictures they will patronize."

His testimony established that out of the 195 Eagle Lion pictures, only 4 were submitted by Eagle Lion to Radio City Music Hall for screening and consideration, and that even these pictures were not accepted because, in the opinion of the witness, they did not measure up to the standards of the quality required by the Music Hall. No Eagle Lion pictures were shown there in this four year period although each of the eight major distributors had some of their pictures exhibited at that theatre during the period in question.

Although practically all of the films distributed by the plaintiffs were inferior in quality and drawing power to those distributed by the major distributors, the difference in net returns only became markedly apparent in those films which grossed nationally more than $500,000. This is evident when we see that 97 of the 195 pictures distributed by plaintiffs had national film rentals of less than $100,000. Included in those pictures were re-issue pictures

of an antiquity which makes them almost part of the folklore of the cinema.*

But when we come to pictures which grossed nationally more than $500,000, we find that this disparity in quality and drawing power still continued and, in the circumstances, it is not surprising that the ratio from the display of these pictures in the metropolitan New York area by the eight major distributors was greater than that of the plaintiffs. Plaintiffs' contention seems to be that they were entitled to derive from the New York metropolitan area film rentals bearing a ratio not less than the corresponding ratio for the eight major distributors. It must be kept in mind that the Sherman Act does not entitle any person to any particular part of a market. It does no more than guarantee a right to compete equally for so much of the market as it can capture and hold by legitimate business methods and the providing of merchandise which the customer will take. See *Interborough News Co.* v. *Curtis Publishing Co., et al.*, 127 F. Supp. 286, at 297 (S. D. N. Y. 1954), aff'd 225 F. 2d 289 (C. A. 2, 1955).

Plaintiffs also urge that when defendants exhibited Eagle Lion Films, they did so only on discriminatory terms or after long delays. No evidence was introduced that any of the terms offered or agreed upon where the result of any conferences, agreements, or understandings between

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* Such as the following pictures which, in the four years involved in this action, had the following gross national revenue:

"GETTING GERTIE'S GARTER"	$17,400
"UP IN MABEL'S ROOM"	17,000
"TWIN BEDS"	15,600
"TILLIE'S ROMANCE"	13,400

Included in the list were also such pictures as "CATTLE QUEEN" which had a national gross revenue in this period of $2,800 and "WEAKER SEX" which had a national gross revenue of $7,300.

the defendants, or were the direct result of any illegal combination or conspiracy. At one point plaintiffs stated that they had no objection to their treatment on any individual film. But at other times, they referred to the terms which they received on individual films as indicative of what they considered the illegal combination or conspiracy. An analysis of the particular instances cited by the plaintiffs indicates a complete lack of proof that the terms which they received were the result of any illegal combination or conspiracy.

Plaintiffs urge, for example, that the contract terms for the film "T-MEN" were discriminatory. Defendants countered with the argument that the contract for the showing of "T-MEN" was not for that film alone but was for the showing of two Eagle Lion films on the same program —"T-MEN" and "OUT OF THE BLUE"; and that from a business standpoint, the licensing arrangements were proper and appropriate. The Court cannot determine, in the abstract, what would have been a fair rental arrangement for these two films. Certainly, there is no proof that the contract arrangement was arrived at as a result of any agreement or understanding of the defendants or that the terms were the result of any combination or conspiracy of the defendants. For example, the plaintiffs offered no evidence of any selling efforts that they made to place these films elsewhere; they offered no evidence that they had attempted to secure an arrangement from RKO or any other circuit for these films.

Plaintiffs urged also that the films "BLACK BOOK" and "TRAPPED" were not shown by the defendants. However, the testimony shows that while one of the defendants was actually negotiating for these films, plaintiffs themselves sold the pictures for a first neighborhood run on another circuit not controlled by either defendant.

Here, again, the argument of the plaintiffs that they received discriminatory terms for the licensing of their films is not supported by any evidence sufficient to lead the Court to conclude that the terms agreed upon were the result of any illegal combination or conspiracy among the defendants. Whether the terms were the result of a poorer quality of the films or inferior selling efforts of the plaintiffs, or were the result of a preference of the defendants to take other films which were then available, is not established by the evidence. Plaintiffs, who had the burden of proof, certainly did not prove that any of these terms were the result of any illegal combination or conspiracy, nor did they establish that Eagle Lion films were denied an opportunity to be played upon the circuits of the defendants. In fact, as has been pointed out, all Eagle Lion films which had a national gross rental of $500,000 or more were actually shown upon the circuits of the defendants; and the Eagle Lion films which had a national rental of less than $500,000 derived a higher ratio of returns from the metropolitan New York area than they did from the national area when compared to similar low revenue films of the eight major distributors.

The Court finds as a fact that plaintiffs have failed to prove exclusion of their films by the defendants; that plaintiffs have failed to prove any conspiracy on the part of the defendants to exclude the plaintiffs from the opportunity of licensing their feature motion pictures on a competitive basis to the Loew's and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway; and that plaintiffs have failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis.

Appendix A

The Court concludes that this lack of proof is not cured by the mere decree in the *Paramount* case and that the complaint should, therefore, be dismissed. *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629 (C. A. 2, 1952), cert. den. 344 U. S. 875 (1952).

I therefore direct entry of judgment for the defendants dismissing the complaint, with costs.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Should either party desire enumerated or additional findings, they may be proposed upon notice to the other side at any time within ten days after the date of this order.

Dated: New York, N. Y.
June 11, 1956

ARCHIE O. DAWSON
U. S. D. J.